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No. 10-

IN THE

Supreme Court of the United States

ALFONSO MORRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment prohibited states from executing individuals who are mentally retarded. The Court left it to the states to determine how mental retardation should be defined and how *Atkins* should be applied. Since then, approaches to *Atkins* have diverged, and in some cases courts have chosen approaches inconsistent with *Atkins* itself.

This petition—in which the Alabama Court of Criminal Appeals held that Petitioner was not mentally retarded, even though his IQ scores were 50 and 53—presents two questions that have divided federal appellate courts and state high courts, and that are central to the *Atkins* inquiry:

1. Whether an expert's determination that a defendant malingered on one of his IQ tests can automatically compel the conclusion that the defendant is not mentally retarded—even in the face of expert testimony that, notwithstanding any malingering, the defendant still has an IQ low enough to establish mental retardation.

2. Whether evidence of deficits in adaptive behavior from the defendant's childhood can be overcome by testimony about his functioning in prison—given the near scientific consensus that adaptive assessments based on incarcerated behavior are unreliable and overstate the defendant's capabilities.

Table of Contents

Questions Presented i

Table Of Authorities iv

Petition For A Writ Of Certiorari 1

Opinions Below 1

Jurisdictional Statement 1

Constitutional And Statutory Provisions Involved 2

Statement of the Case 3

A. Mr. Morris's Competency Hearing and First Trial. 3

B. The *Atkins* Hearing. 5

C. Mr. Morris's Second and Third Trials and Appeal. 10

Reasons for Granting the Writ 12

I. The Lower Courts Are Divided As To Whether A Defendant's Malingering Necessarily Forecloses a Finding of Mental Retardation 13

II. The Lower Courts Are Divided As To The Significance Of Post-Incarceration Evidence In Assessing A Defendant's Adaptive Functioning. 19

Conclusion 25

Appendix A: *Morris* v. *State*, CR-07-1997 (Ala. Ct. Crim. App. Feb. 5, 2010) (affirming conviction and sentence) 1a

Appendix B: *Morris* v. *State*, CR-07-1997 (Ala Ct. Crim. App. Apr. 16, 2010) (denying application for rehearing) 121a

Appendix C: *Morris* v. *State*, 1091052 (Ala. Sept. 17, 2010) (denying petition for writ of certiorari)..... 122a

Appendix D: *State* v. *Morris*, CC-1997-5397 (Jefferson County Circuit Court June 20, 2008) (sentencing order) 124a

Appendix E: *State* v. *Morris*, CC-1997-5397 (Jefferson County Circuit Court Nov. 26, 2007) (oral decision regarding eligiblity for death penalty under *Atkins* v. *Virginia*)..... 143a

Appendix F: *State* v. *Morris*, CC-1997-5397 (Jefferson County Circuit Court Nov. 26, 2007) (excerpts from testimony of Dr. Allen Shealy)..... 147a

Appendix G: *Morris* v. *State*, CR-02-1765 (Ala. Ct. Crim. App. Nov. 23, 2005) (reversing original conviction and sentence)..... 160a

Table Of Authorities

Cases

Atkins v. *Virginia*,
536 U.S. 304 (2002) ..... passim

Chase v. *State*,
873 So. 2d 1013 (Miss. 2004) (en banc) 14

Doss v. *State*,
19 So. 3d 690 (Miss. 2009) 21

Ex parte Perkins,
851 So. 2d 453 (Ala. 2002) 20

Ex parte van Alstyne,
239 S.W.3d 815 (Tex. Crim. App. 2007) 14–15

Holladay v. *Allen*,
555 F.3d 1346 (11th Cir. 2009) 21, 23

Jones v. *State*,
966 So. 2d 319 (Fla. 2007) 20–21

King v. *State*,
23 So. 3d 1067 (Miss. 2009) 14

Lizcano v. *State*,
No. AP-75879, 2010 WL 1817772 (Tex.
Crim. App. 2010) 21–22

Maldonado v. *Thaler*,
625 F.3d 229 (5th Cir. 2010) 20

Morris v. *State*,
956 So. 2d 431 (Ala. Crim. App. 2005) 1

Morris v. *State*,
__ So. 3d __, 2010 WL 415245 (Ala. Crim. App. Feb. 5, 2010) 1

Phillips v. *State*,
984 So. 2d 503 (Fla. 2008) 16

Spicer v. *State*,
973 So. 2d 184 (Miss. 2007) 14

Thomas v. *Allen*,
607 F.3d 749 (11th Cir. 2010) 17

Thomas v. *Quarterman*,
335 Fed. Appx. 386 (5th Cir. 2009) 20

United States v. *Thompson*,
No. 6:05-cr-87-Orl-18DAB, 2007 WL 2480066 (M.D.Fla. Aug 28, 2007) 15

Walker v. *Kelly*,
593 F.3d 319 (4th Cir. 2010) 20

Wiley v. *Epps*,
625 F.3d 199 (5th Cir. 2010) 14

Williams v. *Quarterman*,
293 Fed. Appx. 298 (5th Cir. 2008) 15–16

Statutes And Constitutional Provisions

28 U.S.C. § 1257(a) 1

U.S. Const. amend. VIII 1

U.S. Const. amend. XIV 1–2

Other Authorities

John H. Blume et al., *An Empirical Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 Tenn. L. Rev. 625 (2009). 22

Richard J. Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia: *How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of Mental Retardation in Death Penalty Cases,* 41 U. Rich. L. Rev. 811 (2007) 22–23

Death Penalty Information Center, Number of Executions by State and Region Since 1976, *available at* http://www.deathpenalty info.org/article.php?scid=8 15

Kolleen E. Hurley & William Paul Deal, *Assessment Instruments Measuring Malingering Used With Individuals Who have Mental Retardation: Potential Problems and Issues*, 44 J. Mental Retardation 112 (2006) 18

Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins *v.* Virginia, 11 Widener L. Rev. 121 (2004) 23

Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 Cornell L. Rev. 329 (2010) 22

Mark Libell, Atkins' *Wake: How the States Have Shunned Responsibility for the Mentally Retarded*, 31 Law & Psychol. Rev. 155 (2007) 24

Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. Forensic Psychol. Prac. 1 (2006) 23

Tara L. Victor & Kyle Brauer Boone, *Identification of Feigned Mental Retardation, in Assessment of Feigned Cognitive Impairment* (Kyle Brauer Boone ed., 2007) 18

Petition For A Writ Of Certiorari

Petitioner Alfonso Morris respectfully petitions for a writ of certiorari to the Alabama Court of Criminal Appeals in *Morris* v. *State*, No. CR-07-1997.[1]

Opinions Below

The judgment of the Alabama Court of Criminal Appeals is reported at __ So. 3d __, 2010 WL 415245 (Ala. Crim. App. Feb. 5, 2010) and reprinted at Pet. App. 1a. The court's order denying rehearing is unpublished and reprinted at Pet. App. 121a. The Alabama Supreme Court's order denying discretionary review is unpublished and reprinted at Pet. App. 122a. The trial court's oral decision finding Mr. Morris eligible for the death penalty is reprinted at Pet. App. 143a, and the trial court's written order sentencing Mr. Morris to death is reprinted at Pet. App. 124a.

An earlier decision of the Alabama Court of Criminal Appeals in this case is reported at 956 So. 2d 431 (Ala. Crim. App. 2005) and reprinted at Pet. App. 160a.

Jurisdictional Statement

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

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[1] Although Mr. Morris's first name has been spelled both "Alfonso" and "Alfonzo" in proceedings below, the proper spelling is "Alfonso."

Petitioner's claim has been properly presented and preserved at all stages below. At an evidentiary hearing held on November 26, 2007, Petitioner argued that under *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibited his execution because he is mentally retarded; the trial court rejected this argument on the merits in an oral ruling on the same day. Pet. App. 143a–146a. In a written ruling issued on June 20, 2008, the trial court sentenced Petitioner to death. Pet. App. 141a.

On direct appeal to the Alabama Court of Criminal Appeals, Petitioner again argued that under *Atkins*, the Eighth Amendment prohibits his execution because he is mentally retarded. Pet. App. 8a–9a. In a written opinion dated February 5, 2010, the Alabama Court of Criminal Appeals rejected this argument on the merits. Pet. App. 8a–29a. Petitioner filed a timely application for rehearing to the Alabama Court of Criminal Appeals, which denied the application on April 16, 2010. Pet. App. 121a. Petitioner then filed, with the Alabama Supreme Court, a timely petition for certiorari, which was denied on September 17, 2010. Pet. App. 122a.

Constitutional And Statutory Provisions Involved

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall

any State deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

This is a death penalty case. After three trials, which included one hung jury, Petitioner Alfonso Morris was sentenced to death for murder. Although Mr. Morris's IQ scores were 50 and 53, the latter from a test by a court-appointed expert, the Alabama Court of Criminal Appeals rejected his argument that he was ineligible for the death penalty because he is mentally retarded.

A. Mr. Morris's Competency Hearing and First Trial.

On February 24, 1997, 85-year old Miriam Rochester was found dead in her home, after an apparent burglary. Pet. App. 2a, 4a. Mr. Morris was arrested the next morning for public intoxication, and he was later charged with the murder. Pet. App. 5a.

In February 1999, Mr. Morris filed a plea of not guilty by reason of mental disease or defect. *Id.* at 167a. The trial court appointed Dr. Kimberly Ackerson, a certified forensic examiner, to evaluate Mr. Morris. *Id.* at 168a. She concluded that Mr. Morris was incompetent to stand trial, *id.*, and diagnosed him as mentally retarded, *id.* at 172a–74a. Dr. Ackerson's testing revealed that Mr. Morris had an "IQ score of 53"—"in the moderate range of mental retardation and is well below the first percentile." *Id.* at 170a–71a.

Dr. Ackerson stated that Mr. Morris "appeared to put forth his best effort during testing, and he was generally cooperative during the interview sessions." *Id.* at 170a. She also noted that IQ testing from Mr. Morris's childhood, as documented in school records, "revealed that his intellectual functioning was 'well below average.'" Pet. App. 169a–70a.

In December 2001, the court ordered that Mr. Morris be committed to Taylor Hardin Secure Medical Facility, where he stayed until February 2002. *Id.* at 176a. After several delays, the court held a competency hearing in December 2002. *Id.* at 177a. At the hearing, Dr. Kamal Nagi, who evaluated Mr. Morris during his stay at Taylor Hardin, testified that Mr. Morris "was malingering his lack of knowledge of the legal process and the charges against him." *Id.*

Defense counsel repeatedly asked the trial court for funds to hire an independent mental-health expert to evaluate Mr. Morris, noting that "an expert was necessary to support the plea of not guilty by reason of mental disease or defect." *Id.* at 180a. The trial court denied the motion on February 26, 2003. *Id.* at 180a–81a.

Without funds to hire an expert, Mr. Morris withdrew his plea of not guilty by reason of mental disease or defect. *Id.* at 183a. Mr. Morris presented no defense during the guilt phase, and he was convicted of capital murder. *Id.* By a vote of 10–2, the jury recommended that Mr. Morris be sentenced to death, *id.* at 160a–61a; the trial court accepted the jury's recommendation and sentenced Mr. Morris to death, *id.* at 161a.

On appeal, the Alabama Court of Criminal Appeals reversed both the conviction and sentence, holding that "the trial court erred to reversal when it denied Morris's request for funds to hire an independent mental-health expert." *Id.* at 185a. Noting that a mental-health expert was critical to Mr. Morris's defense at the sentencing phase, *id.* at 202a, the court observed, among other things, Dr. Ackerson's finding that "Morris was functioning in the moderate range of mental retardation." *Id.* at 191a.[2]

B. The *Atkins* Hearing.

On remand, and after Mr. Morris received the funds necessary to secure his own expert, the trial court held a hearing to determine whether Mr. Morris was mentally retarded under *Atkins*.

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[2] The Court of Criminal Appeals also rejected the state's argument that certain letters and pleadings, purportedly written by Mr. Morris, foreclosed a finding of mental retardation. Prior to trial, the prosecutor had presented these documents to Dr. Ackerson and informed her that Mr. Morris had written them, leading her eventually to opine that "Morris had exaggerated his intellectual deficits during her evaluation of him, because someone in the moderate range of mental retardation could not have written the types of letters she was provided to review." Pet. App. 204–05a.

As the Court of Criminal Appeals recognized, however, "it was this *unsubstantiated assertion* that led Dr. Ackerson to change her opinion about Morris's cognitive functioning." *Id.* at 205a (emphasis added). The court held that "[t]he record does not support the State's assertion, which it made before trial to Dr. Ackerson and during trial to the court and which it continues to make on appeal, that Morris *wrote* the documents." *Id.* (emphasis in original).

1. Mr. Morris presented the expert testimony of Dr. Allen Shealy, who at the time was one of only three board-certified forensic psychologists in Alabama. *Id.* at 147a–48a. Dr. Shealy interviewed Mr. Morris and his sisters, and reviewed prior evaluations of Mr. Morris as well as other documentary evidence. *Id.* at 148a–49a.

Based on his own testing, Dr. Shealy concluded that Mr. Morris "was mentally retarded and was in the range of mild mental retardation and had a full-scale IQ of fifty which falls below the first percentile of the general population." *Id.* at 149a. Dr. Shealy also "considered [the] IQ test administered in 1999 by Dr. Kimberly Ackerson, finding that Morris had a full scale IQ of 53." *Id.* at 14a. As for Mr. Morris's adaptive behavior, Dr. Shealy had concluded that Mr. Morris "was significantly impaired in several areas," including communication, daily living, and socialization, and that "his adaptive behavior had been impaired since childhood"—such that Mr. Morris's "mental retardation had manifested before [he] reached age 18." *Id.* at 15a–16a; *see also id.* at 157a–58a.

2. Mr. Morris also took an IQ test administered by Dr. Glenn King, the State's expert psychologist, and received an IQ score of 41. *Id.* at 20a. Dr. King asserted that Mr. Morris was malingering because, among other things, of his scores on the Test of Memory Malingering. *Id.* at 22a. Dr. King did not formally opine on Mr. Morris's IQ, stating only that it was "possibly in the low 80s." *Id.*

In light of Dr. King's opinions, Dr. Shealy also addressed the possibility that Mr. Morris was malingering. Dr. Shealy conceded that Mr. Morris's motivation "might have been less than optimal" during Dr. King's test. *Id.* at 154a. But Dr. Shealy noted that malingering does not necessarily foreclose a diagnosis of mental retardation: "the conclusion that because somebody is malingering on a malinger[er]'s test does not lead one to the automatic conclusion that the person is not mentally retarded." *Id.* Rather, "it would lead to the conclusion by that examiner that he's functioning somewhat higher than the obtained IQ score." *Id.*

Dr. Shealy testified that a mentally retarded individual "is capable of taking a [malingerer's] test and scoring in the range that would indicate that he's malingering, even if he's mentally retarded." *Id.* at 150a. *See also id.* at 156a ("[Y]ou can have an IQ in the range of mild mental retardation and still be bright enough to [malinger], still have enough intellectual ability to do that."); *id.* at 157a ("[J]ust because somebody is mentally retarded doesn't mean they can't also be malingering."). Ultimately, Dr. Shealy concluded that Mr. Morris "may have been malingering, but it's my conclusion that he was still mentally retarded." *Id.* at 159a.

Dr. Shealy elaborated upon his conclusion that Mr. Morris was mentally retarded, even if he had been malingering on Dr. King's test.

First, Dr. Shealy noted that tests designed to detect malingering, including the Test of Memory Malingering administered by the State's expert

psychologist, are often inaccurate and produce false positives. He noted that scientific literature has documented that malingering tests "should be viewed with extreme caution when they're used with mentally retarded subjects." *Id.* at 151a.

Second, Dr. Shealy testified that during his evaluation, Mr. Morris was in fact attempting to demonstrate his ability to function, not trying to downplay his ability to do so. According to Dr. Shealy, "if he had been malingering that he is mentally retarded, I don't know why he would have offered to [show] me what he could do." *Id.* at 158a.

Third, Dr. Shealy noted that when Mr. Morris was six years old, his school administered the Primary Mental Abilities Test and concluded that Mr. Morris "had an IQ of seventy-three." *Id.* at 152a. According to Dr. Shealy, "the American Association of Mental Retardation specifies that in terms of IQ, that the person has to . . . have an IQ score of seventy to seventy-five or [below] on a standardized individual intelligence test." Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 18. According to Dr. Shealy, "if we know from the history that he's been mentally retarded since six years old, it makes the issue of whether he's malingering in adulthood moot." Pet. App. at 151a.

Indeed, testimony from Mr. Morris's siblings revealed that Mr. Morris developed more slowly than other children, that he did not learn to talk until age three, and that he "had difficulty playing games with the other children in the community." Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 71–72. Mr. Mor-

ris was classified by his school as "Slow." Clerk's Record (Second Supp. Record) at 383. Mr. Morris's school records detailed that he failed most of his classes, that he was forced to repeat eighth grade, and that he dropped out of school in ninth grade. *Id.* at 382, 386.[3] And his sisters testified that he has never held any type of long-term employment, could not fill a prescription or take medicine as directed, could not take his temperature if he was sick, and could not wash clothes or vacuum properly. Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 39, 73–75, 79.

3. The State introduced evidence about Mr. Morris's activities during his incarceration, including testimony from a nurse, Vicki Webster, that "she had met with Morris at least six times concerning his medical conditions and treatments while he was incarcerated at the jail." Pet. App. 17a. According to

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[3] From grades one through five, Mr. Morris received a rating of Unsatisfactory—for each year—in the subjects of Arithmetic, Language, Reading, and Spelling. Clerk's Record (Second Supp. Record) at C-2 383. He received a rating of Unsatisfactory for all years but one in Science and Social Studies. *Id.* In sixth grade, Mr. Morris received grades of D in Arithmetic, Language, Reading, Science, Social Studies, and Spelling. *Id.* In seventh grade, Mr. Morris received grades of D and F in English, F and F in Social Studies, B and B in Math, F and F in Science, and D and D in Physical Education. *Id.* In 8th grade, which he was forced to repeat, Mr. Morris received grades of D+ and D in Arithmetic, F and F in Language, F and C in Science, F and B in Social Studies, and F and F in Spelling. *Id.* at 386. In 9th grade, at the time that Mr. Morris withdrew from school, he was receiving failing grades in English, Math, Science, and Social Studies. *Id.* at 382.

Ms. Webster, Mr. Morris was "able to take advantage of the medical services provided in the jail, as well as fill out the written medical forms." *Id.* In addition, the state introduced evidence that Mr. Morris at one point was self-employed as a provider of lawn services and also made a living "hustling, gambling, stealing [and selling] marijuana," and that he was able to provide jail officials with information about his family. *Id.* at 18a.

As it had done during Mr. Morris's first appeal, the state again attempted to demonstrate that Mr. Morris had written certain court pleadings that had been filed on his behalf in other cases. Although the state's handwriting analyst concluded that Mr. Morris signed his name on each of the documents, "the handwriting in the text of the documents was inconclusive as to the author." *Id.*

In an oral decision, the trial court rejected Mr. Morris's *Atkins* claim. Despite Dr. Shealy's that Mr. Morris had an IQ of 50, even accounting for the possibility of malingering, the trial court asserted that "none of these experts can give you a true IQ score because he's malingering." *Id.* at 143a. Moreover, apparently referring to Mr. Morris's conduct in prison, the trial court stated that "it sounds like to me he's fully capable of adapting and surviving and understanding what he's doing." *Id.* at 144a.

C. Mr. Morris's Second and Third Trials and Appeal.

Mr. Morris's first retrial took place in April 2008. The trial resulted in a hung jury, and the trial court

declared a mistrial. *Id.* at 2a. Mr. Morris was tried for the third time in May 2008, and this time he was convicted. *Id.* By a vote of 10–2, the jury recommended that Mr. Morris be sentenced to death, and the trial court sentenced Mr. Morris to death in June 2008. *Id.* at 39a.

The Alabama Court of Criminal Appeals affirmed the conviction and sentence. Among other things, the court rejected Mr. Morris's argument that the Eighth Amendment prohibited his execution because he is mentally retarded. In so doing, the court held that Mr. Morris had failed to satisfy the three requirements of *Atkins*, as applied by the Alabama courts: that (1) he suffers from below average intellectual functioning, (2) he suffers from significant deficits in adaptive behavior, and (3) these problems manifested themselves before he reached age 18. *See id.* at 11a.

Intellectual Functioning. On the question of Mr. Morris's intellectual functioning, the court acknowledged Dr. Shealy's conclusion that Mr. Morris "was mildly mentally retarded and had a full-scale IQ of 50" and the conclusion of Dr. Ackerson that he "had a full scale IQ of 53 and that he was moderately mentally retarded." *Id.* at 14a. Nevertheless, in upholding the trial court's determination, the court relied on the conclusion by the state's expert, Dr. King, that Mr. Morris's "malingering indicated that he was not mentally retarded." *Id.* at 24a.

Adaptive Behavior/Manifestation Before Age 18. The court also concluded that Mr. Morris had not demonstrated the necessary deficits in adaptive be-

havior, and that his mental retardation had not manifested itself before age 18. The court noted the testimony from Mr. Morris's sister about adaptive deficits, including the deficits that were apparent during Mr. Morris's childhood, but pointed to, among other things, "evidence indicating that Morris sought medical attention in jail when needed and articulately requested his medication or need for treatment." *Id.* at 28a.

The Court of Criminal Appeals denied Mr. Morris's timely application for rehearing on April 16, 2010. *Id.* at 121a. On September 17, 2010, the Alabama Supreme Court denied Mr. Morris's timely petition for certiorari, over the dissent of Justice Murdock. *See id.* at 122a–23a.

Reasons for Granting the Writ

In *Atkins* v. *Virginia*, 536 U.S. 304 (2002), the Court held that the Eighth Amendment, as applied to the states by the Fourteenth Amendment, prohibits states from executing individuals who are mentally retarded. Although the Court left implementation of *Atkins* to the states, it stressed that states cannot adopt definitions of mental retardation that cover a smaller group than those considered mentally retarded under the national consensus approach. *See id.* at 317.

In concluding that—notwithstanding his IQ scores of 50 and 53—Mr. Morris was not mentally retarded within the meaning of *Atkins*, the Court of Criminal Appeals rested on two bases that contradict the scientific consensus on mental retardation. Each

of these bases, moreover, are contrary to decisions of other federal appellate courts and state high courts and impact significant numbers of death-penalty cases.

I. The Lower Courts Are Divided As To Whether A Defendant's Malingering Necessarily Forecloses a Finding of Mental Retardation.

Under *Atkins*, an IQ "between 70 and 75 or lower" is "considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." *Id.* at 309 n.5. Mr. Morris's documented IQ scores were 50 and 53. Yet the Alabama Court of Criminal Appeals upheld the trial court's decision that Mr. Morris had not established the necessary subaverage intellectual functioning based on the testimony of the state's expert that Mr. Morris's "malingering indicated that he was not mentally retarded." Pet App. 24a.

The court's reasoning—malingering alone can refute a finding of subaverage intellectual functioning—is contrary to a decision of the Texas Court of Criminal Appeals and to the scientific consensus about the intellectual functioning of individuals who are mentally retarded.

A. Notwithstanding his individual IQ scores of 50 and 53, the Alabama Court of Criminal Appeals upheld the trial court's reliance on testimony that Morris's "malingering indicated that he was not mentally retarded." *Id.* Thus, the Court of Criminal Appeals relied solely on malingering as a basis for overriding

the results of the IQ tests—even though Mr. Morris's own expert accounted for the possibility of malingering and notwithstanding the uncontradicted evidence that a mentally retarded individual "is capable of taking a [malingerer's] test and scoring in the range that would indicate that he's malingering, even if he's mentally retarded." *Id.* at 150a.

The reasoning of the Alabama Court of Criminal Appeals is echoed by the Mississippi Supreme Court, which has taken the Alabama approach a step further. In *Chase* v. *State*, 873 So. 2d 1013 (Miss. 2004) (en banc), the Mississippi Supreme Court held that to sustain an *Atkins* claim, the defendant's expert must express, to a reasonable degree of certainty, that a malingering test was completed, and that "the defendant is not malingering." *Id.* at 1029. *See also, e.g.*, *Wiley* v. *Epps*, 625 F.3d 199, 206 (5th Cir. 2010) (Mississippi courts will not afford relief under *Atkins* unless "the defendant is not malingering"); *King* v. *State*, 23 So. 3d 1067, 1075 (Miss. 2009) (same); *Spicer* v. *State*, 973 So. 2d 184, 209 (Miss. 2007) (same).

The decisions of the Alabama Court of Criminal Appeals and Mississippi Supreme Court conflict with a recent decision of the Texas Court of Criminal Appeals. In *Ex parte van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007), the defendant had taken two IQ tests and received scores of 69 and 56. *See id.* at 818. The state's expert, who administered the second test, expressed concern "about the possibility of malingering on the [defendant's] part." *Id.* Nevertheless, the court held that these concerns about malingering did

not foreclose a finding of mental retardation: "regardless of whether the applicant may have been malingering in an attempt to obtain a lower score ten days later with [the State's expert], the test results obtained by [the defendant's expert], placing the [defendant] within the range of the mildly mentally retarded, remain valid." *Id.* at 818 n.8.[4]

In the context of the death penalty, a division of authority between Alabama and Mississippi, on the one hand, and Texas, on the other, is significant. In 2010, those three states accounted for the majority of American executions. *See* The Death Penalty Information Center, Number of Executions by State and Region Since 1976, *available at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=186 (last updated November 5, 2010). And the question presented is especially important, given the frequency with which states argue that low IQ scores result from malingering rather than mental retardation. *See, e.g.*, *Williams* v. *Quarterman*, 293 Fed.

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[4] Similarly, a federal district court for Florida recognized, in the context of assessing a defendant's competency to stand trial, that a diagnosis of malingering "does not provide any definitive indication of [a] Defendant's true intellectual capacity." *United States* v. *Thompson*, No. 6:05-cr-87-Orl-18DAB, 2007 WL 2480066, at *2 (M.D.Fla. Aug 28, 2007). As in Mr. Morris's case, the defendant presented scores in the mid-50's from tests where no malingering was suspected, and the state presented contradictory expert testimony that the defendant had malingered on their test and that he was probably not retarded. *Id.* at 5. The court held that "[i]t is possible, of course, for a mentally retarded individual to malinger," and therefore, that the defendant's "refusal to cooperate . . . does not logically support the conclusion that he is not mentally retarded." *Id.*

Appx. 298, 310–11 (5th Cir. 2008) (rejecting *Atkins* claims based in part on finding of malingering); *Phillips* v. *State*, 984 So. 2d 503, 510 (Fla. 2008) (same).

This case also presents an excellent vehicle to resolve the role of malingering in the assessment of intellectual functioning. The *Atkins* claim was fully litigated below on the merits, and the record is well developed following an evidentiary hearing. Moreover, the question presented is dispositive of the intellectual-functioning analysis: absent the conclusion that malingering can automatically defeat a claim of mental retardation, the Alabama Court of Criminal Appeals would have had to conclude that Mr. Morris suffers from the intellectual deficit necessary to sustain an *Atkins* claim. Mr. Morris's IQ scores, which arose from testing by two of Alabama's three board certified forensic psychologists, Pet. App. 147a–48a, were 53 and 50. And whereas the state's expert did not present a definitive opinion about Mr. Morris's IQ, Mr. Morris's expert accounted for the possibility of malingering in his conclusion that Mr. Morris had an IQ of 50. *Id.* at 159a.[5]

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[5] Both Dr. Shealy and Dr. Ackerson also noted that Mr. Morris's score of 73 when he was six further demonstrated that he was mentally retarded. Pet. App. 151a (Dr. Shealy: "if we know from the history that he's been mentally retarded since six years old, it makes the issue of whether he's malingering in adulthood moot"); *id.* at 169–70a (Dr. Ackerson: childhood IQ testing "revealed that his intellectual functioning was 'well below average'"). The Court in *Atkins* held that the diminished intellectual-function requirement can be satisfied by an IQ score of "between 70 and 75 or lower." *Atkins*, 536 U.S. at 309 n.5. And notwithstanding Dr. King's naked assertion that an IQ

B. In addition to conflicting with the approach of the Texas Court of Criminal Appeals, the decision of the Alabama Court of Criminal is incorrect. A defendant can be both malingering and mentally retarded.

As Dr. Shealy testified, without contradiction, "the conclusion that because somebody is malingering on a malinger[er]'s test does not lead one to the automatic conclusion that the person is not mentally retarded." Pet. App. 154a. Rather, a mentally retarded individual "is capable of taking a [malingerer's] test and scoring in the range that would indicate that he's malingering, even if he's mentally retarded." *Id.* at 150a. *See also id.* at 156a ("[Y]ou can have an IQ in the range of mild mental retardation and still be bright enough to [malinger], still have enough intellectual ability to do that."); *id.* at 157a ("[J]ust because somebody is mentally retarded doesn't mean they can't also be malingering.").

Scientific research confirms that it is possible for someone to malinger during an IQ test and still be mentally retarded. In one instance, an individual who was diagnosed with an IQ of 58 prior to age 18—and prior to any legal difficulties—scored 4 out of 50 on the Test of Memory and Malingering, "a score well below chance and suggestive of his awareness of the correct answers despite his responses to the con-

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of 73 is "certainly not retarded," Pet. App. 22a, "[t]here is no Alabama case law stating that a single, or even multiple, raw IQ score above 70 automatically defeats an *Atkins* claim when the totality of the evidence (scores) indicates that a capital offender suffers subaverage intellectual functioning." *Thomas* v. *Allen*, 607 F.3d 749, 757 (11th Cir. 2010).

trary." Tara L. Victor & Kyle Brauer Boone, *Identification of Feigned Mental Retardation, in Assessment of Feigned Cognitive Impairment* 311, 335 (Kyle Brauer Boone ed., 2007).

The conclusion of the Alabama Court of Criminal Appeals—that malingering can automatically foreclose a finding of subaverage intellectual functioning—is especially problematic because malingering assessments are often inaccurate. In one study, the Test of Memory Malingering, upon which the state's expert relied in this case, misclassified over 40 percent of the sample as malingering when in fact many were actually mentally retarded. Kolleen E. Hurley & William Paul Deal, *Assessment Instruments Measuring Malingering Used With Individuals Who have Mental Retardation: Potential Problems and Issues*, 44 J. Mental Retardation 112, 116 (2006). As a result, "considerable caution [must] be exercised when using these various instruments [including The Test of Memory Malingering] for assessment of individuals with below average intelligence or mental retardation." *Id.* at 117.

* * *

Mr. Morris had IQ scores of 50 and 53. His expert testified, without contradiction, that even mentally retarded individuals can malinger, and took malingering into account in calculating Mr. Morris's IQ. The approach of the Alabama Court of Criminal Appeals and the Mississippi Supreme Court—allowing suspicion of malingering to override multiple IQ scores under 55—conflicts with that of the Texas Court of Criminal Appeals and contradicts the

most relevant science. Accordingly, the Court should grant the petition to resolve the proper standard for assessing allegations of malingering.

II. The Lower Courts Are Divided As To The Significance Of Post-Incarceration Evidence In Assessing A Defendant's Adaptive Functioning.

In *Atkins*, the Court recognized that the standard definition of mental retardation includes "limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3 (quotations omitted). In concluding that Mr. Morris did not suffer from the necessary adaptive deficits, the Alabama Court of Criminal Appeals relied extensively on post-incarceration evidence—contrary both to other federal appellate and state high courts and to the relevant science.

A. The evidence of deficits in adaptive behavior, included Mr. Morris's school records, which revealed that he was "Slow" and failed most of his classes, Clerk's Record (Second Supp. Record) at 382–86, and extensive evidence from his siblings, who identified a range of significant limitations, Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 39, 71–75, 79.

In upholding the trial court's conclusion that Mr. Morris nonetheless did not suffer from significant adaptive deficits, the Alabama Court of Criminal Appeals relied heavily on testimony related to Mr.

Morris's incarceration. In particular, the court noted that "Morris sought medical attention in jail when needed and articulately requested his medication or need for treatment." *Id.* at 28a. *See also id.* at 17a (nurse's testimony that "she had met with Morris at least six times concerning his medical conditions and treatments while he was incarcerated at the jail"); *id.* (Mr. Morris was "able to take advantage of the medical services provided in the jail, as well as fill out the written medical forms"). *See also Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002) (rejecting *Atkins* claim and noting that the defendant "earned a GED certificate while he has been in prison and has completed community college classes there").

The Alabama courts are joined in this approach by the Fourth and Fifth Circuits and the Florida Supreme Court. *See Walker* v. *Kelly*, 593 F.3d 319, 328 (4th Cir. 2010) (rejecting *Atkins* claim and noting that defendant had "obtained goods for himself while in prison" (quotations omitted)); *Maldonado* v. *Thaler*, 625 F.3d 229, 243 (5th Cir. 2010) (rejecting *Atkins* claim and noting, from the defendant's incarceration, his "interactions with others, his correspondence with others, his maintaining a commissary account, and his use of the grievance system" (quotations omitted)); *Thomas* v. *Quarterman*, 335 Fed. Appx. 386, 389 (5th Cir. 2009) (rejecting *Atkins* claim and noting that defendant "demonstrated organizational skills while incarcerated, successfully following a weight-loss plan and using a calendar to keep track of his appeals"); *Jones* v. *State*, 966 So. 2d 319, 328 (Fla. 2007) (relying on post-incarceration evidence of (1) defendant's exer-

cise regimen, (2) ability to obtain medical care, (3) maintain funds in inmate account, and (4) keep cell clean and orderly).

Other courts, including the Eleventh Circuit, the Mississippi Supreme Court, and the Texas Court of Criminal Appeals, have rejected this approach.

In *Holladay* v. *Allen*, 555 F.3d 1346 (11th Cir. 2009), the Eleventh Circuit noted that "[i]t would be inaccurate to use current observers of [the defendant] because his [prison] environment is so restricted that one could not get a proper breadth of understanding of his abilities." *Id.* at 1351. *See also id.* at 1358 n. 16 ("Both experts agreed that [his] adaptive functioning cannot be accurately assessed now because he has spent over 17 years in prison, a highly restricted and restrictive environment.). In particular, and contrary to the Alabama Court of Criminal Appeals in this case, the Eleventh Circuit held that the defendant had demonstrated the necessary adaptive deficits, even though he was able "to procure appropriate medical care while he was incarcerated." *Id.* at 1360.

Likewise, in *Doss* v. *State*, 19 So. 3d 690 (Miss. 2009), the Mississippi Supreme Court recognized the diminished value of post-incarceration evidence of adaptive functioning. *See id.* at 714 (collecting literature); *id.* ("Dr. Grant admitted that the adaptive-functioning tests he administered were not normed for a prison population."). And in *Lizcano* v. *State*, No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010), the Texas Court of Criminal Appeals rejected reliance on testimony that "in the institu-

tional setting of the jail, the appellant could maintain his hygiene and keep his cell orderly" because "evidence of apparent adaptive strengths displayed in an institutional context are of limited probative value." *Id.* at *38.

It is especially important for the Court to resolve this lower-court split on the appropriate use of prison behavior in assessing a defendant's adaptive functioning. Nearly 30 percent of all courts rejecting *Atkins* claims have relied at least in part on the defendant's prison behavior. John H. Blume et al., *An Empirical Look at* Atkins v. Virginia *and its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 636 (2009). The "selective focus by the courts on the adaptive strengths of *Atkins* claimants" is especially common in states, like Alabama, "with active capital dockets." Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 Cornell L. Rev. 329, 351–52 (2010).

B. As with the question of malingering, the decision of the Alabama Court of Criminal Appeals is incorrect. Scientists have recognized that "the limited opportunities available to people in prison make it impossible to assess adaptive behavior 'within the context of community environments . . .' as required by the 2002 AAMR standards." Caroline Everington & J. Gregory Olley, *Implications of* Atkins v. Virginia*: Issues in Defining and Diagnosing Mental Retardation*, 8 J. Forensic Psychol. Prac. 1, 12 (2008).[6]

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[6] *See also* Richard Bonnie & Katherine Gustafson, *The Challenge of Implementing* Atkins v. Virginia: *How Legislatures and Courts Can Promote Accurate Assessments and Adjudications of*

Finally, this case presents an excellent vehicle for the Court assess the manner in which courts rely on evidence of prison behavior to rebut family testimony about a defendant's capabilities during childhood. As with the malingering issue, the question of Mr. Morris's adaptive capabilities was fully litigated on the merits in the trial court and on appeal, following an evidentiary hearing.

Moreover, the reliance on prison-behavior evidence affects the ultimate outcome of Mr. Morris's case. The other evidence presented by the state and relied on by the Court of Criminal Appeals, including Mr. Morris's history of odd-jobs and his alleged attempt to deceive the police upon his arrest, would not itself establish the necessary adaptive functioning. *See Holladay*, 555 F.3d at 1349–50, 1359–60 (defendant suffered from significant adaptive deficits even though he could administer blood tests to himself, drive a car, had been married, held jobs, committed petty thefts, could remember names and dates, and has successfully escaped from prison). Similarly, the

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Mental Retardation in Death Penalty Cases, 41 U. Rich. L. Rev. 811, 848–49 (2007) (measuring the adaptive behavior of an incarcerated defendant "poses significant problems"); Linda Knauss & Joshua Kutinsky, *Into the Briar Patch: Ethical Dilemmas Facing Psychologists Following* Atkins *v.* Virginia, 11 Widener L. Rev. 121, 131 (2004) (adaptive assessments are "unusually tricky with incarcerated individuals, because the structure and supports provided by a prison environment . . . reduce . . . the environmental demands placed upon inmates"); Kay B. Stevens & J. Randall Price, *Adaptive Behavior, Mental Retardation, and the Death Penalty*, 6 J. Forensic Psychol. Prac. 1, 19 (2006).

use of prison-behavior testimony also appeared to affect the court's consideration that Mr. Morris's mental retardation did not begin before age 18—notwithstanding his IQ score of 73 at age six and his poor performance in school—as the Court of Criminal Appeals pointed to Mr. Morris's attempts to seek medical care in prison to contradict testimony from Mr. Morris's sister that he was "incapable of taking his temperature or taking medicine." Pet. App. 28a.

* * *

Commentators have warned that "without a future holding clarifying what constitutes mental retardation," many states "will continue to violate the spirit, if not the letter, of the Eighth Amendment to the Constitution." Mark Libell, Atkins' *Wake: How the States Have Shunned Responsibility for the Mentally Retarded*, 31 Law & Psychol. Rev. 155, 155 (2007). The two issues presented by Mr. Morris's case provide an excellent opportunity for the Court to provide needed clarity and ensure that lower courts respect *Atkins* in both letter and spirit.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 10-____

IN THE

Supreme Court of the United States

ALFONSO MORRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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Table of Contents

Appendix A: *Morris* v. *State*, CR-07-1997 (Ala. Ct. Crim. App. Feb. 5, 2010) (affirming conviction and sentence) 1a

Appendix B: *Morris* v. *State*, CR-07-1997 (Ala Ct. Crim. App. Apr. 16, 2010) (denying application for rehearing) 121a

Appendix C: *Morris* v. *State*, 1091052 (Ala. Sept. 17, 2010) (denying petition for writ of certiorari) 122a

Appendix D: *State* v. *Morris*, CC-1997-5397 (Jefferson County Circuit Court June 20, 2008) (sentencing order) 124a

Appendix E: *State* v. *Morris*, CC-1997-5397 (Jefferson County Circuit Court Nov. 26, 2007) (oral decision regarding eligiblity for death penalty under *Atkins* v. *Virginia*). 143a

Appendix F: *State* v. *Morris*, CC-1997-5397 (Jefferson County Circuit Court Nov. 26, 2007) (excerpts from testimony of Dr. Allen Shealy). 147a

Appendix G: *Morris* v. *State*, CR-02-1765 (Ala. Ct. Crim. App. Nov. 23, 2005) (reversing original conviction and sentence). 160a

Appendix A

ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 2009-2010

CR-07-1997

Alfonzo Morris
v.
State of Alabama

Appeal from Jefferson Circuit Court
(CC-97-5397)

MAIN, Judge.

On April 3, 2003, Alfonzo Morris was convicted of two counts of capital murder for the intentional killing of Miriam Rochester during the course of a first-degree burglary, see § 13A-5-40(a)(4), Ala.Code 1975, and the intentional killing of Miriam Rochester during the course of a first-degree robbery, see § 13A-5-40(a)(2), Ala.Code 1975. Following a sentencing hearing, the jury returned an advisory verdict of death, by a vote of 10–2. A sentencing hearing was held before the trial court, and Morris was sentenced to death. Following an automatic appeal to this Court, his conviction and sentence were reversed, and the cause was remanded for further proceedings. *Morris v. State,* 956 So.2d 431 (Ala.Crim.App. 2005). This Court determined that Morris was denied his rights

to due process and a fair trial because he was not provided with funds to hire an independent mental-health expert.

On November 26, 2007, a hearing was conducted pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335, (2002), to determine whether Morris is mentally retarded and therefore not subject to execution under the Eighth Amendment of the United States Constitution. After hearing the evidence and arguments of counsel, the trial court applied the test set out in *Atkins* and determined that Morris is not mentally retarded.

On April 7, 2008, Morris was again tried for the two counts of capital murder. The jury was unable to reach a verdict, and the trial court declared a mistrial. A third trial began on May 5, 2008.

The State's evidence showed that on February 24, 1997, Miriam Rochester, who was 85 years-old, used a walker, and weighed 92 pounds, was beaten to death in her home. Rochester had transformed her home into a duplex and had taken in a boarder, Elizabeth Russell, who was also elderly and in poor health. The two ladies had become friends, and, on the night of the offense, at approximately 9:30 p.m., Rochester telephoned one of Russell's sons to inform him that Russell had become ill and was being taken to the hospital.

A rescue unit and fire engine arrived at the house at approximately 9:00 p.m. and were shown to Russell by Rochester. The paramedic who was the driver

of the rescue unit testified that the "house was very neat and orderly." (R. 201.) After Russell was assessed and the ambulance called, the paramedic testified that she went outside to check on her truck. She testified that she saw someone "fooling around my rescue unit acting like he was looking in the windows, fooling with the doors." (R. 203.) She then asked the person if there was a problem and if she could help him. The man, whom she identified in court as Morris, walked up to her and asked what was happening and who was sick; he insisted that he wanted to go inside the house. The paramedic testified that at one point Morris attempted to bypass her and enter the house, but she prevented him from doing so. He told her that "he lived in that area and he knew everybody and he had a right to go in there." (R. 205.)

Although Morris smelled strongly of alcohol, the paramedic testified that Morris understood what she was telling him and that his responses were appropriate. As the paramedic saw the rescue crew carrying Russell out to the ambulance, she also saw Morris finally turn and walk away. The paramedic thereafter stepped into the ambulance and through the opened back doors of the vehicle saw that Morris had returned. She informed her partner that Morris had been causing trouble previously, and her partner instructed him to leave. The paramedic testified that she saw Morris walk approximately half of a block away as the rescue crew left.

At approximately 10:00 p.m., Russell's son telephoned Rochester to update her on Russell's condi-

tion. He received a call from his brother about an hour later, informing him that the brother had been to Rochester's house at his mother's request and that the door was open and the house appeared to have been ransacked. Both of Russell's sons then went to the house and without entering determined, that the house had been vandalized. They attempted to telephone Rochester and then telephoned the police.

The police and rescue units arrived around midnight, among them the same paramedic who had earlier cared for Russell. She testified that she originally believed that Russell was the deceased. However, because of the number of police officers present, she determined that the death was not believed to be due to natural causes. She informed the officers that she had been called to the house earlier on that night and that the house had not been in disarray. She also told them about Morris's presence and behavior. She did not know his name at that time but gave the officers his description.

The first officer who had arrived at the scene testified that there were "pry marks" on the door, indicating forced entry. (R. 261.) He took a description from the paramedic of the man who had attempted to gain entry into the house and, after the scene was processed, he left at approximately 4:00 a.m. and resumed his patrol of the area. At approximately 5:00 a.m., he observed a man fitting the description of the person who had earlier attempted to enter Rochester's house earlier. The man appeared to be intoxicated and was staggering down the middle of the

street. The officer asked the man questions and he responded in a "slurred, but logical way." (R. 265.)

The officer determined that it was not safe for the man to continue and arrested him for public intoxication. The officer identified Morris at trial as the man he had arrested. He asked the man if he was carrying any weapons, and he responded that he had a pocketknife in his right front pocket. (R. 267.) He also stated that he had other items in his pockets that he described as "junk." (R. 267.) The officer stated that the items were pieces of costume jewelry. He also had a couple of pills and a cigarette in his pockets. Morris identified himself as "Anthony Morris" and gave the officer an address for his residence.[1] (R. 270.)

Before the officer left the scene of Morris's arrest, the paramedic was brought to that location to determine if she could identify him as the man she had seen earlier. The paramedic testified that she was certain that he was the man she had seen earlier at Rochester's house. (R. 223.) Morris was taken to the administrative building where officers concluded that he was too intoxicated to be interviewed. He was taken to jail for the night and interviewed the following day.

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[1] It was later determined that Anthony Morris is Morris's brother and the address that he gave the officer was that of his brother. He also gave his brother's date of birth when the officers were taking his clothing to be processed.

Rochester's granddaughter and Russell's son identified some of the jewelry taken from Morris as belonging to the victim and Russell.[2] Blood found on Morris's shoe was determined to be Rochester's and a cigarette butt found in the Rochester's house contained Morris's DNA.

Morris testified at trial that he had been drinking on the day of the offense and had gotten into an argument with the man with whom he had been living. He left the house and eventually began gambling with a man known as "Cue Ball." (R. 433.) He testified that he won a bag of jewelry from "Cue Ball" and that, as he was attempting to gather the jewelry, "Cue Ball" snatched money from him and a fight ensued. He stated that other gamblers got involved in the altercation, because they did not want him to leave since he was winning. Morris stated that he suffered cuts and bruises, as well as a laceration over his eye, in the altercation. He testified that "Cue Ball" threw the jewelry at him and that he picked it up and walked to a Huddle House restaurant for breakfast. He stated that he became belligerent with the waitress because he had been drinking, and he was forced to leave. He also testified that after eating he put a cigarette in his mouth but did not light it.

Morris testified that he then encountered a police officer who indicated that Morris appeared to have been drinking and arrested him for public intoxica-

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[2] Some of the jewelry could not be identified.

tion. Morris stated that he was taken in the police car "to the scene of a crime in a house" (R. 441), where a woman identified him. (R. 443–444.) While he was standing in front of the police vehicle, he stated that a dog "came from somewhere" and ran around his feet. (R. 444.) He was subsequently taken to the hospital to treat the laceration to his eye and then was taken to the jail.

Because Morris has been sentenced to death, this Court must review the proceedings below for plain error, under Rule 45A, Ala.R.App.P., which states:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

This plain-error standard of review has been addressed by this court as follows:

> "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation

> of judicial proceedings.' See *Ex parte Price,* 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State,* 723 So.2d 742 (Ala.Cr.App. 1997), aff'd, 723 So.2d 770 (Ala. 1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State,* 620 So.2d 679, 701 (Ala.Cr.App. 1992), rev'd on other grounds, 620 So.2d 709 (Ala. 1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

Hall v. State, 820 So.2d 113, 121-22 (Ala.Crim.App.1999), affirmed, 820 So.2d 152 (Ala. 2001), cert. denied, 979 U.S. 1080, (2002). "The standard applicable to plain-error review is a stringent one...." *Ex parte Perkins,* 851 So.2d 453, 455 (Ala. 2002), cert. denied, 540 U.S. 830, 124 S.Ct. 69, 157 L.Ed.2d 55 (2003).

Although Morris's failure to object will not preclude this Court from reviewing an issue, it will weigh against any claim of prejudice. *See Dill v. State,* 600 So.2d 343 (Ala.Crim.App. 1991), affirmed, 600 So.2d 372 (Ala. 1992), cert. denied, 507 U.S. 924, 113 S.Ct. 1293, 122 L.Ed.2d 684 (1993).

I.

Morris argues that his execution is prohibited by the Eighth Amendment to the United States Constitution because he is mentally retarded. He raises several contentions on appeal to support his argument.

The record indicates that a hearing was held pursuant to *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and following the presentation of the evidence and arguments of counsel, the trial court concluded that Morris is not mentally retarded. Morris argues that the trial court made a number of factual errors and that it relied on "reasoning foreclosed by the courts" in making its determination. (Morris's brief, at 29.)

The trial court's decision is due to be evaluated under an abuse-of-discretion standard. *Byrd v. State,* [Ms. CR-07-0113, May 1, 2009] __ So.3d __, __ (Ala.Crim.App.2009) (""""A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision."""").

The United States Supreme Court in *Atkins* provided guidelines for determining whether a person is mentally retarded to the extent that he or she should not be executed. However, the Court also held that ultimately the states should establish their own definitions. The Court stated:

> "To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to

> fall within the range of mentally retarded offenders about whom there is a national consensus. As was our approach in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' *Id.*, at 405, 416–417."

536 U.S. at 317, 122 S.Ct. at 2250. (Footnote omitted).

Alabama has yet to statutorily define mental retardation in the context of determining the sufficiency of an *Atkins* claim. However, Alabama has defined a mentally retarded person for the purposes of the "Retarded Defendant Act," § 15-24-1 et seq., Ala.Code 1975, as follows:

> "Mentally retarded person. A person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period, as measured by appropriate standardized testing instruments."

§ 15-24-2(3), Ala.Code 1975.

The Alabama Supreme Court has directed that review of *Atkins* claims are to be conducted applying the "'most common' or 'broadest' definition of mental retardation, as represented by the clinical definitions considered in *Atkins* and the definitions set forth in the statutes of other states that prohibit the imposi-

tion of the death sentence when the defendant is mentally retarded. *See, e.g., Ex parte Perkins,* 851 So.2d 453, 455–56 (Ala. 2002)." *Smith v. State,* [Ms. 1060427, May 25, 2007] __ So.3d __, __ (Ala. 2007). Moreover, in examining the definitions of mental retardation in other states with statutes prohibiting the execution of a mentally retarded person, the Alabama Supreme Court has written:

> "Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)."

Ex parte Perkins, 851 So.2d 453, 456 (Ala. 2002).[3]

Similarly, in suggesting guidance for determining whether a defendant is mentally retarded so as to prohibit the defendant's execution, the *Atkins* Court discussed clinical definitions of mental retardation and concluded that these definitions "require not

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[3] See 851 So.2d at 456 n. 3 for a list of statutes referenced. Moreover, *Morrow v. State,* 928 So.2d 315, 323–24 n. 8, 9, and 10 (Ala.Crim.App. 2004), provides a list of states that have created procedures for determining mental retardation legislatively and judicially and sets out states' varying requisite burdens of proof.

only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." 536 U.S. at 318. Further, "[i]mplicit in the definition is that the subaverage intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18." *Smith v. State,* __ So.3d at __.

Alabama appellate courts have determined that until the Alabama Legislature establishes a definition for mental retardation to be used in determining *Atkins* claims, Alabama courts will continue to review such claims "on a case-by-case basis and to apply the guidelines that have been judicially developed thus far." *Morrow v. State,* 928 So.2d 315, 324 (Ala.Crim.App. 2004).

The burden of proof for a claim that a capital defendant is mentally retarded and therefore may not constitutionally be executed is on the defendant, and he or she must prove this claim by a preponderance of the evidence. Cf. *Trawick v. State,* 698 So.2d 151 (Ala.Crim.App. 1995) (overruling *Bass v. State,* 585 So.2d 225 (Ala.Crim.App. 1991), to the extent it implied that the burden of proving an insanity defense was by a "preponderance of the evidence" rather than by "clear and convincing evidence").

> "'In the context of an *Atkins* claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded.' *Smith v. State,* [Ms. 1060427, May 25, 2007] __

So.3d at __; *see Smith v. State,* [Ms. CR-97-1258, Jan. 16, 2009] __ So.3d __ at __ (Ala.Crim.App. 2000) (opinion on return to fourth remand). "'The question of [whether a capital defendant is mentally retarded] is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony of that issue.'" *Smith v. State,* [Ms. CR-97-1258, Jan. 16, 2009] __ So.3d at __ (quoting *Atkins v. Commonwealth,* [266 Va. 73,] 581 S.E.2d 514, 515 (2003)). As the Alabama Supreme Court has explained, questions regarding weight and credibility determinations are better left to the circuit courts, 'which [have] the opportunity to personally observe the witnesses and assess their credibility.' *Smith v. State,* [Ms. 1060427, May 25, 2007] __ So.3d at __ (quoting *Smith v. State,* [Ms. CR-97-1258, Sept. 29, 2006] __ So.3d __, __ (Ala.Crim.App. 2006) (Shaw, J., dissenting)(opinion on return to third remand))."

Byrd v. State, __ So.3d at __. *See also Jenkins v. State,* 972 So.2d 165, (Ala.Crim.App. 2005) ("'Preponderance of the evidence' is defined as: 'The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.' *Black's Law Dictionary* 1220 (8th ed. 2004).").

Moreover, if Morris fails to prove even one of the three prongs of the *Atkins* test by a preponderance of the evidence, he has not satisfied his burden of proof. *Smith v. State,* __ So.3d at __ ("All three factors must be met in order for a person to be classified as mentally retarded for purposes of an *Atkins* claim.").

Following this Court's decision on Morris's first direct appeal, an *Atkins* hearing was held to provide him the opportunity to prove by a preponderance of the evidence that he is mentally retarded. Morris presented the testimony of Dr. Allen Shealy, a psychologist, who testified that he had interviewed Morris on two occasions for a period of three hours each time.

As to Morris's intellectual functioning, he administered the Wechsler Adult Intelligence Scale Edition 3, the Bender-Gestalt with Cantor Interference Procedure, and the Vineland II Adaptive Behavior Scale. He also testified that he interviewed Morris's two sisters and reviewed a number of Morris's records, including his prison and school records. He also testified that he reviewed previous psychological reports and testings, as well as records from the Taylor Hardin Secure Medical Facility. Dr. Shealy concluded that Morris was mildly mentally retarded and that he had a full-scale IQ of 50. (*Atkins* hearing R. 17.) He testified that, chronologically, he reviewed Morris's first IQ test administered when Morris was six years of age, which had resulted in an IQ score of 73. He also noted that he had considered an IQ test administered in 1999 by Dr. Kimberly Ackerson, finding that Morris had a full scale IQ of 53 and that he

was moderately mentally retarded. He testified that he then considered his own findings, as well as the last testing conducted by Dr. Glenn King in October 2007, which Morris scored a full-scale IQ of 41; Dr. King concluded that he was malingering.

As to Morris's adaptive behavior, Dr. Shealy testified that he first considered the findings of the Alabama Department of Mental Health after it had administered the AAMD Adaptive Behavior Scale in 1999 and had concluded that Morris was moderately retarded. He then considered the test he administered, concluding that Morris was significantly impaired in several areas, particularly in communication. He also found that Morris was impaired in daily living and somewhat in socialization. Most recently, Morris was given an adaptive behavior scale by Dr. King, who concluded that Morris was functioning at an age of five years and six months, but Dr. King believed that Morris was malingering. Although Dr. Shealy also concluded that Morris may have been malingering, he discounted the importance of this conclusion, because he testified that even the mentally retarded can malinger. Moreover, he stated that because he was in special education classes as a child, the issue of malingering on the more current tests was moot. (*Atkins* hearing R. 25).

Moreover, Dr. Shealy concluded, based on a statement by the Alabama Department of Mental Health that the reported history information on Morris suggested that his adaptive behavior had been impaired since childhood, as well as on school re-

cords, that his mental retardation had manifested before Morris reached age 18.

At the hearing, Morris also presented the testimony of one of his sisters as to his adaptive behavior as a child. She testified that Morris was a slow learner and that he could not manage money or his medicine. She also testified that he did not separate colors before doing the wash, did not clean well, and did not prepare meals. She stated that he had never lived alone that he had never married but had fathered two children.

The State presented the testimony of Wyatt Rhone, a patient-education coordinator at Taylor Hardin Secure Medical Facility. He testified that he had met with Morris several times, both when he was an outpatient and when he was an inpatient. Specifically, he testified that in 2006, Morris was transported from jail to Taylor Hardin, where Rhone met with him six times during a four-to six-week period. Morris's beginning assessment score was a zero, and at the completion of the six-week course, he was still assessed at zero. Rhone testified that examples of questions on the test are: "[W]ho's the head of the courtroom[?]" (*Atkins* hearing R. 85.) "Who represents you or talks for you in court, which of course would be your lawyer. Who is it that's against you in court, which is the D.A." (*Id.*) He testified that he found it difficult to believe that Morris would have scored a zero because the questions concerned very basic knowledge, and on certain occasions Morris was able to discuss far more complex matters; he gave as an example a discussion they had had con-

cerning an episode of the television show *The Crocodile Hunter*.

Approximately 10 to 11 months later, when Morris was an inpatient, Rhone testified that he met with him for 13 30-minute sessions. He gave Morris the same test, and he again scored zero. He also gave Morris a true-false test containing 10 questions and Morris scored a zero, which Rhone stated was "a little unusual." (*Atkins* hearing R. 91.) He testified that he administered the true-false test a second time, and Morris answered one question correctly. Rhone concluded that "[i]f he was managing to answer all of them wrong, that was an indication of an intellectual ability to reason that out." (*Atkins* hearing R. 92). Rhone also stated that Morris typically refused to answer multiple-choice questions. He testified that he determined that Morris was malingering.

The State presented the testimony of Vicki Webster, a nurse at the Jefferson County jail, who stated that she had met with Morris at least six times concerning his medical conditions and treatments while he was incarcerated at the jail. She testified that Morris demonstrated familiarity with his medical conditions and recounted his medical history and past medications. He was also able to take advantage of the medical services provided in the jail, as well as to fill out the written medical forms.

Ned Whitehead testified for the State that he was custodian of the records at the Jefferson County jail. He identified a visitors log that indicated, despite Morris's statement to Dr. Shealy that he had

not seen his family and that they may not know where he is, that Morris's family members had visited him a number of times.

Terry Love, of the Alabama Probation and Parole Office, testified that he had interviewed Morris pursuant to a presentence investigative report that had been ordered in 2003. Morris provided the information, such as his parents' names and the dates they had die d, his siblings' names, and his employment history, including "lawn service self-employed from '92 to '97, how much he made doing it, hustling, gambling, stealing, sold marijuana, a variety of things he was doing to make a living." (*Atkins* hearing R. 112). He also provided the names and ages of his children. (*Atkins* hearing R. 114).

Phillip Russell, of the Birmingham Police Department, testified that he interviewed Morris on the day after his arrest in the present case. He testified that Morris gave him his brother's, Anthony Morris's, name, date of birth, and address as his own. He signed his statement using his brother's name.

A handwriting specialist, Steven Drexler, testified for the State that Morris gave a number of writing samples for comparison purposes and that he could determine that the signature on the submitted court documents was that of Morris. He stated, however, that the handwriting in the text of the documents was inconclusive as to the author. Drexler testified that Morris had attempted to alter his handwriting in a number of the samples and that "[i]n particular [in] the extended writings where he was

writing paragraph after paragraph after paragraph and maintaining that altered style, in my opinion it would take a great deal of mental fortitude to be able to maintain that style and not resort back to your normal habits." (*Atkins* hearing R. 157). Moreover, Drexler concluded that the reason he could not make a determination concerning the author of the text of the documents was because the "extended writing standard provided to me was not natural writing. And because I am comparing natural writing to unnatural writing, my opinion is I don't have an opinion, it's inconclusive." (*Atkins* hearing R. 163).

Finally, the State presented the testimony of Dr. Glenn King, a clinical and forensic psychologist, who interviewed Morris on two occasions at the Jefferson County Detention Facility. He first spoke with Morris on October 3, 2007 and testified that initially Morris indicated that he did not know his Social Security number or his prison-identification number (AIS number). Dr. King testified that "I've been interviewing and evaluating death row inmates since about 1991, both in Georgia and Alabama. And Mr. Morris is the first person that's not known his AIS number." (*Atkins* hearing R. 176.) He indicated that he had no relationship with family members and that he did not know their birth dates or ages. He indicated that at the time of his arrest he was living with "some more people, would not identify them." (*Atkins* hearing R. 177.) He indicated that he had been involved in odd jobs, including lawn service and steel-mill assembly work and that he had a driver's license. Dr. King stated that when asked the farthest distance he had driven, he became evasive. He also

found that Morris was malingering in his answers as to the current date and his current location. Dr. King testified:

> "His thought processes were normal in progress and form. And at the same time, throughout the interview from the early onset, he was, in my opinion, somewhat uncooperative, mildly hostile, didn't want to be there, clipped in his answers, frequently evasive, not answering questions or frequently saying 'I don't know' to things. And that's how I would describe his affect as well is that he was somewhat indifferent to the process and at other times he was uncooperative."

(*Atkins* hearing R. 178.)

Dr. King testified that he administered an IQ test to Morris and that his overall score was 41, which placed him "below the lowest one tenth of one percent of the general population." (*Atkins* hearing R. 181–82.) He stated that "a lot of Morris's scores were in the three to five year old range." (*Atkins* hearing R. 182.) Dr. King concluded that Morris was "clearly malingering" for a number of reasons. (*Atkins* hearing R. 183.) He noted that his IQ scores were "totally inconsistent" with his "general presentation" during the interview, as well as his responses and statements on the videotapes made at the time of the arrest. (*Atkins* hearing R. 182.) Moreover, some of the questions Morris answered incorrectly could be answered correctly by people who suffer from extreme mental retardation. As examples, Dr. King noted that Morris was shown a picture of a cat

with a ball and stated that the picture showed a cat with a kid. He was unable to take four blocks and put them in the shape of a person although a plate showed the design. Even after Dr. King demonstrated the appropriate configuration, Morris was still unable to do so. Dr. King also pointed out the inconsistency in Morris's inability to count a series of blocks while his achievement test showed that he could add and subtract simple numbers. In the achievement test, Morris was able to read fill-in-the-blank questions but responded with written answers that were obviously incorrect. Morris was unable to spell simple words on his achievement test; however, in contrast, his written requests for health care consultations contained misspelled words but were sophisticated as to syntax and vocabulary.

As to adaptive behavior, Dr. King testified that he tested Morris on the 10 "domains" dealing with the ability to communicate, the ability to use community resources, and functional academics. (*Atkins* hearing R. 191.) He stated that the range of the scoring was 1 to 19, with the average being 10. As to Morris's scores, Dr. King testified:

> "He scored a three or lower on absolutely everything indicating that he essentially is nonfunctional in all of these areas meaning he's not able to communicate, not able to use community resources, not able to have any academic abilities, unable to take care of himself, has no conception really of health and safety issues, can't use leisure activities, can't even take care of himself in terms of bathe himself, wash himself and that sort of thing, cannot

> direct himself, and also has no social relationships meaning in almost all of these cases-in five of the subtest scores, he scored one, which is the lowest possible. And his individual answers on some of the items were also absurd."

(*Atkins* hearing R. 192.) Among the answers given by Morris were that he was unable to answer the telephone or to cut his meat in order to eat it.

Dr. King also testified that he administered a test to Morris specifically devised to determine if the respondent is malingering–the Test of Memory Malingering. Dr. King found that Morris was malingering based on his scores on that test. He also noted that his previous test scores given by other administrators also indicated that he was malingering; for example, Dr. King noted that the chances of Morris's having scored a 0 on a 10-question true-false test was 1 in 4,000. He also noted that Dr. Kamal Nagi, a psychiatrist and forensic examiner at Taylor Hardin Secure Medical Facility who had also interviewed Morris, believed that he was malingering.

Ultimately, based on all of the information available to him, Dr. King concluded that Morris functions in the high borderline to low average range of intellectual ability with an IQ possibly in the low 80s. He also found that Morris's adaptive skills indicated that he could drive and that he was able to support himself by working. Moreover, he noted that the IQ test that he was administered in first grade scored him at 73, "certainly not retarded." (*Atkins* hearing R. 202.) Dr. King also noted that he had re-

viewed Morris's school records and that there was no indication that Morris was ever in special-education classes. The court confirmed through the attorneys that Dr. Shealy had stated that Morris was in special-education classes based on information from Morris or family members. (*Atkins* hearing R. 204.) Dr. King testified that Morris's school records indicated that he was a slow learner, but that he was rated as average in seventh grade for participation in class discussions and activities; further, although there was a place on the form in the school records on which to indicate any handicaps, none were included for Morris.

On cross-examination, Dr. King stated that he asked Morris if he had a "jailhouse lawyer" at the Jefferson County jail help him fill out his documents, and Morris responded that he did not. Morris informed him that when he had been at Homewood, he had someone who had helped him on occasion. Dr. King concluded that Morris is not mentally retarded.

Based on the evidence presented at the hearing, the trial court found that Morris was not retarded. Specifically, the court found that, because all the examiners believed that Morris was malingering, they could not establish an accurate IQ score; rather they acknowledged that his actual IQ may be higher than the scores he had received through testing. He also found that Morris was able to adapt and function, referencing his ability to sell drugs and street-savvies. Finally, he found that there was no manifestation of retardation before age 18, stating that he

believed that Morris's school records were more reliable than the accounts given by his family members.

In the present case, Morris has not proved by a preponderance of the evidence that he is mentally retarded, such that the determination by the trial court, pursuant to the discretion vested in it as the fact finder, should be reversed. As to Morris's intellectual functioning, the experts all found that he was malingering. Although Dr. Shealy concluded that this fact did not prohibit his finding that Morris is mentally retarded, Dr. King and Wyatt Rhone both found that Morris's specific instances of malingering indicated that he was not mentally retarded. The trial court was entitled to weigh the conflicting testimony of the experts and evaluate their testimony. The court did not exceed its discretion in doing so.

While the jury is the fact finder in reconciling conflicting expert testimony as to mental competency at the time of the offense, the following guidelines are applicable to the trial court's determination as to conflicting expert testimony as to mental retardation:

> """Opinions of experts in the field of mental disorders as to an accused's sanity or insanity are of course admissible and certainly should be carefully considered by a jury. Such opinion evidence is not, however, conclusive on the jury. The responsibility is upon the jury to weigh all the evidence, expert and lay, pertaining to the issue of the accused's mental competency. The weight to be accorded all such evidence is solely within the

jury's province. They may reject it all even though it is without conflict."

"*Fitzhugh v. State,* 35 Ala.App. 18, 26, 43 So.2d 831, 838, cert. denied, 253 Ala. 246, 43 So.2d 839 (1949), cert. denied, 339 U.S. 986, 70 S.Ct. 1007, 94 L.Ed. 1388 (1950)....

"'....

"'"Expert testimony, even when uncontradicted, is not conclusive on the issue of sanity, ... and the jury may find such testimony adequately rebutted by the observations of mere laymen." [*United States v.] Mota,* 598 F.2d [995] at 999 [(5th Cir.1979)]. See also *Greider v. Duckworth,* 701 F.2d 1228, 1234 (7th Cir. 1983) ("The jury could credit the testimony of lay witnesses over that of an expert witness"); *United States v. Emery,* 682 F.2d 493, 498 n. 3 (5th Cir.), cert. denied, 459 U.S. 1044, 103 S.Ct. 465, 74 L.Ed.2d 615 (1982) ("The jury can find expert testimony adequately rebutted by the observations of laymen").

"'....

"'Although "a factfinder need not adhere to an expert opinion on incompetency if there is reason to discount it," *Strickland v. Francis,* 738 F.2d 1542, 1552 (11th Cir. 1984), "the jury cannot arbitrarily ignore the experts in favor of the observations of laymen," id., and must have an "objective reason," to disregard the expert's opinion which is rebutted

only by lay testimony. *Wallace v. Kemp,* 757 F.2d 1102, 1109 (11th Cir. 1985).

> """In making this judgment [to disregard the expert's opinion], the court should consider
>
> """(1) the correctness or adequacy of the factual assumptions on which the expert opinions are based;
>
> """(2) possible bias in the experts' appraisal of the defendant's condition;
>
> """(3) inconsistencies in the experts' testimony, or material variations between experts; and
>
> """(4) the relevance and strength of the contrary lay testimony.
>
> """*Strickland,* 738 F.2d at 1552; *Brock [v. United States,]* 387 F.2d [254, 258 (5th Cir. 1967)] (quoting *Mims v. United States,* 375 F.2d 135, 143–44 (5th Cir. 1967))."
>
> "'*Wallace v. Kemp,* 757 F.2d at 1109.'
>
> "*Ellis v. State,* 570 So.2d 744, 751–53 (Ala.Cr.App. 1990)."

Dunaway v. State, 746 So.2d 1021, 1033 (Ala.Crim.App. 1998), affirmed, 746 So.2d 1042 (Ala. 1999); cert. denied, 529 U.S. 1089, 120 S.Ct. 1724, 146 L.Ed.2d 645 (2000).

Moreover, Morris did not prove by a preponderance of the evidence that any of the alleged deficits in his adaptive behavior that might indicate retardation had manifested before the age of 18. Although his sisters testified that he could not live alone and that he had always lived with family members, evidence at the hearing in the presentence investigative report indicated that Morris was living with another man at the time of the offense.[4] There was also no indication in Morris's school records that he attended special-education classes. A review of Morris's school records, contained in the record on appeal as Defendant's Exhibit 4, indicates that he was considered to be a slow learner and was described as "mischievous" in elementary school, but was assessed an IQ score of 73. Although he failed courses in 7th and 8th grades, he also made B's, C's, and D's. Because the evidence was conflicting and therefore implicated credibility and weighing choices, this determination is better suited to the trial court. See generally *Ex parte Bridgett,* 1 So.3d 1057, 1063 (Ala. 2008); *Denson v. Middleton,* 17 Ala.App. 266, 267, 84 So. 473, 474 (1919). There is no indication from the evidence presented that the determination made by the trial court was improper.

As to Morris's adaptive functioning, although there was evidence indicating that Morris was incapable of living alone and of performing certain basic

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[4] During Morris's testimony at trial, he acknowledged that he was renting from a handicapped man with whom he lived and for whom he shopped and prepared meals. (R. 428–29.)

tasks, this evidence came generally from Morris himself or his sisters. Although Morris's sister testified that Morris was incapable of taking his temperature or taking medicine, the State presented evidence indicating that Morris sought medical attention in jail when needed and articulately requested his medication or need for treatment.[5] The State also presented evidence that Morris had worked and engaged in drug dealing and gambling. *See Smith v. State,* [Ms. 1060427, May 25, 2007] __ So.3d at __ ("'More insightful into Smith's adaptive behavior is the fact that Smith was involved in an interstate illegal-drug enterprise.'"). There was also evidence indicating that Morris worked in lawn care and in assembly work. Cf. *Holladay v. Allen,* 555 F.3d 1346, 1359 (11th Cir. 2009) (Holladay's jobs included pumping gas "which he had to leave because he could not work the cash register" and a warehouse job that he lost "because other employees were concerned about his inabilities."). The State presented further evidence indicating that Morris used his brother's name, address, and date of birth when he was arrested and again in a statement to the police. *See Smith v. Smith,* __ So.3d at __ (Alabama Supreme Court considered the fact that Smith gave a police officer a false name two days before the offense as indicating of a lack of deficits in his adaptive behavior.).

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[5] It is also notable that although Morris's sister also testified that he was incapable of cooking a meal, Morris testified at trial that he had cooked breakfast for his landlord and himself on the morning of the offense.

Morris's specific arguments raised on appeal address conflicts in the evidence, which were properly weighed and evaluated by the trial court as the finder of fact. Therefore, the trial court did no err in determining that Morris is not mentally retarded for purposes of *Atkins*.

II.

Morris argues that he was improperly sentenced to death because, he says, the trial court failed to consider and to find the existence of several nonstatutory mitigating circumstances, and it impermissibly counted the same aggravating circumstance twice.

A.

Morris contends that the trial court improperly failed to consider the following nonstatutory mitigating evidence: that he had a low level of intelligence; that he had a poor educational history; that he suffered from psychiatric problems; that he had a history of alcohol and drug abuse; that he was intoxicated at the time of the crime; that his parents divorced when he was a teenager; that his father died in a fire when he was a teenager and his mother died four months before the crime for which he was convicted; that the killing of Rochester was not planned because he believed no one was home; that he had adapted to prison life; and that his sister asked for mercy on his behalf. Thus, Morris argues that the trial court's finding, without explanation in its sen-

tencing order that no nonstatutory mitigating circumstances existed was erroneous.

Morris did not object on this ground at the trial court level; therefore this issue must be analyzed pursuant to the plain-error rule. Rule 45A, Ala.R.App.P.

In *Johnson v. State,* [Ms. CR-99-1349, October 2, 2009] __ So.3d __ (Ala.Crim.App. 2009), this Court determined that the trial court's failure to make specific findings as to each nonstatutory mitigating circumstance in its sentencing order did not constitute plain error. Moreover, as in the present case, the sentencing order addressed all that was required, although it did not list or find any nonstatutory mitigating circumstances. In so holding, we wrote:

> "In *Ex parte Lewis,* [Ms. 1070647, May 29, 2009] __ So.3d __ (Ala. 2009), the Alabama Supreme Court quoted *Clark v. State,* 896 So.2d 584 (Ala.Crim.App. 2000), concerning a trial court's duty in considering whether proffered evidence constitutes a mitigating circumstance, stating:
>
> > "'"The sentencing order shows that the trial court considered all of the mitigating evidence offered by Clark. The trial court did not limit or restrict Clark in any way as to the evidence he presented or the arguments he made regarding mitigating circumstances. In its sentencing order, the trial court addressed each statutory mitigating circumstance listed in § 13A-5-51, Ala.Code 1975, and it determined that none of those circum-

stances existed under the evidence presented. Although the trial court did not list and make findings as to the existence or nonexistence of each nonstatutory mitigating circumstance offered by Clark, as noted above, such a listing is not required, and the trial court's not making such findings indicates only that the trial court found the offered evidence not to be mitigating, not that the trial court did not consider this evidence. Clearly, the trial court considered Clark's proffered evidence of mitigation but concluded that the evidence did not rise to the level of a mitigating circumstance. The trial court's findings in this regard are supported by the record.

"'"Because it is clear from a review of the entire record that the trial court understood its duty to consider all the mitigating evidence presented by Clark, that the trial court did in fact consider all such evidence, and that the trial court's findings are supported by the evidence, we find no error, plain or otherwise, in the trial court's findings regarding the statutory and nonstatutory mitigating circumstances."

"'896 So.2d at 652–53 (emphasis added).'

"__ So.3d at __.

"Here, it is clear that the trial court considered all of the evidence offered and made proper findings as to what evidence constituted nonstatutory mitigating circumstances. "'[T]he trial court is not required to specify in its sentencing order each item of pro-

posed nonstatutory mitigating evidence offered that it considered and found not to be mitigating." *Williams v. State,* 710 So.2d 1276, 1347 (Ala.Crim.App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998).' *Brown v. State,* 11 So.3d 866, 932 (Ala.Crim.App. 2007), affirmed, *Ex parte Brown,* 11 So.3d 933 (Ala. 2008), cert. denied, *Brown v. Alabama,* __ U.S. __ , 129 S.Ct. 2864, 174 L.Ed.2d 582 (2009). 'We have often stated that "'[a]lthough the trial court is required to consider all mitigating circumstances, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer.'" *Boyd v. State,* 715 So.2d 825, 840 (Al.Crim.App. 1997), aff'd, 715 So.2d 852 (Ala. 1998), quoting *Williams v. State,* 710 So.2d 1276, 1347 (Ala.Crim.App. 1996), aff'd, 710 So.2d 1350 (Al.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998).' *Hodges v. State,* 856 So.2d 875, 932 (Ala.Crim.App. 2001), affirmed, *Ex parte Hodges,* 856 So.2d 936 (Ala. 2003), cert. denied, *Hodges v. Alabama,* 540 U.S. 986, 124 S.Ct. 465, 157 L.Ed.2d 379 (2003) (finding that 'a trial court is not bound to find as a mitigating circumstance that a codefendant received a lesser sentence than death. See *Johnson v. State,* 820 So.2d 842 (Ala.Crim.App. 2000), aff'd, 820 So.2d 883 (Ala. 2001)')."

__ So.3d at __.

Here, Morris made no argument at sentencing concerning the existence of any nonstatutory mitigat-

ing circumstances. In fact, the only witness the defense presented was Morris's sister, who became emotional and was unable to testify. Morris did not argue the existence of any of the now cited nonstatutory mitigating circumstances at the sentencing hearing.

> "'The trial court did not have an obligation to instruct on a statutory mitigating circumstance that was not relied upon or argued during the penalty phase. As we stated in *Johnson v. State*, 820 So.2d 842, 875 (Ala.Crim.App. 2000), [aff'd], 820 So.2d 883 (Ala. 2001):
>
> > "'"Johnson did not present any evidence at the penalty phase concerning the statutory mitigating circumstances enumerated in § 13A-5-51....
> >
> > "'"'....
>
> "'"The trial court's instructions were consistent with the evidence presented at the penalty phase; they did not constitute plain error. As we stated in *Pressley v. State*, 770 So.2d 115, 141-42 (Ala.Cr.App. 1999):
>
> > "'"'The trial judge had no burden to recognize a statutory mitigating circumstance not presented by the defense, and proffer it to the jury.... There is no requirement that the trial court read the entire list of statutory mitigating circumstances to a jury where there was no evidence offered to support each circumstance. *Holladay v. State*, 629 So.2d 673, 687 (Ala.Cr.App. 1992), cert. denied,

> 510 U.S. 1171, 114 S.Ct. 1208, 127 L.Ed.2d 555 (1994). The trial court's instructions were sufficient. The trial court did not commit plain error by not sua sponte instructing the jury on a statutory mitigating circumstance not offered by Pressley."
>
> ""'See also *Burgess v. State*, 723 So.2d 742 (Ala.Cr.App. 1997), aff'd, 723 So.2d 770 (Ala. 1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Rieber v. State*, 663 So.2d 985 (Ala.Cr.App. 1994), aff'd, 663 So.2d 999 (Ala.), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995).'"
>
> "*McGriff v. State*, 908 So.2d 961 at 1020 (Ala. Crim App 2000) (opinion on return to remand)."

Ziegler v. State, 886 So.2d 127, 148 (Ala.Crim.App. 2003), cert. denied, 543 U.S. 863, 125 S.Ct. 194, 160 L.Ed.2d 106 (2003).

The jury was charged as to every statutory mitigating circumstance and charged that it could consider any aspect of Morris's character or record. *See* § 13A-5-51 and § 13A-5-52, Ala.Code 1975. The trial court is not required to recognize a nonstatutory mitigating circumstance where no evidence was presented at sentencing as to its existence, nor was any such nonstatutory mitigating circumstance argued by Morris as to any impact it may have in determining his sentence.

B.

Morris argues that the trial judge and the jury improperly counted the same aggravating circumstance twice. He refers to the aggravating circumstances that the murder was committed while Morris was engaged in the commission of a burglary, § 13A-5-49 § 4), Ala.Code 1975, and that the murder was committed when Morris was engaged in the commission of a robbery, § 13A-5-49(4), Ala.Code 1975. He argues that because the same conduct supported a finding of both aggravating circumstances, the trial court and jury should have considered and found only one.

Morris raises this claim for the first time on appeal; therefore, this claim must be evaluated pursuant to the plain-error rule. *See* Rule 45A, Ala.R.App.P.

However, this Court has previously recognized that if two or more of the circumstances that make the offense a capital offense are also aggravating circumstances under § 13A-5-49(4), Ala.Code 1975, then the trial court may consider and find each of the underlying offenses as an aggravating circumstance and so charge the jury.

In *Turner v. State,* 924 So.2d 737 (Ala.Crim.App. 2002), cert. denied, 547 U.S. 1056, 126 S.Ct. 1653, 164 L.Ed.2d 399 (2006), Turner claimed that his constitutional rights had been violated by the consideration of both robbery and rape, the underlying of-

fenses in his capital-murder charge, as two separate aggravating circumstances. This Court found:

> "As we stated in *Hodges v. State*, 856 So.2d 875, 889 (Ala.Crim.App. 2001), 'If the actions committed during the course of the murder support the finding that more then one of the enumerated underlying felonies was committed, then a trial court may apply § 13A-5-49(4) more than once.' Citing *Stewart v. State*, 730 So.2d 1203 (Ala.Crim.App. 1997), aff'd, 730 So.2d 1246 (Ala.1999)."

924 So.2d at 790.

The circumstances of Rochester's murder support a finding that the murder occurred during a burglary and robbery and that each aggravating circumstance should apply to Morris's sentencing.

C.

Morris argues that the Eighth Amendment to the United States Constitution requires that he be sentenced to no more than life in prison without parole. Specifically, Morris contends that because the murder was "entirely unplanned and given the wealth of mitigating evidence in Mr. Morris's background," the aggravating circumstances were outweighed by the mitigating circumstances, and he should have been sentenced to life imprisonment without the possibility of parole.

Morris raises this issue for the first time on appeal; thus, the plain-error rule applies. *See* Rule 45A, Ala.R.App.P.

The process of weighing the aggravating circumstances and the mitigating circumstances is addressed in § 13A-5-48, Ala.Code 1975:

> "The process described in Sections 13A-5-46(e)(2), 13A-5-46(e)(3) and Section 13A-5-47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death."

The weighing process is best undertaken by the sentencing authority, who has directly heard the evidence and seen the witnesses and therefore can better determine what evidence should have the greater impact in determining the proper punishment for the capital defendant. This process does not deal with numerical values or comparisons. The determination rests on the specific circumstances of each case.

> "In keeping with the dictates of the United States Supreme Court in *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the sentencing

> authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. *Murry v. State*, 455 So.2d 53 (Ala.Crim.App. 1983), rev'd on other grounds, 455 So.2d 72 (Ala. 1984). Therefore, the trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. *Moore v. Balkcom*, 716 F.2d 1511 (11th Cir. 1983). The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation."

Ex parte Clisby, 456 So.2d 105, 108–09 (Ala. 1984), cert. denied, *Clisby v. Alabama*, 470 U.S. 1009, 105 S.Ct. 1372, 84 L.Ed.2d 391(1985).

Moreover,

> """[w]hile the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617–18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and,

> unlike facts, is not susceptible to proof by either party.'
>
> """696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See *Lawhorn v. State*, 581 So.2d 1159, 1171 (Ala.Crim.App. 1990) ('while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party'); see also *Melson v. State*, 775 So.2d 857, 900–901 (Ala.Crim.App. 1999); *Morrison v. State*, 500 So.2d 36, 45 (Ala.Crim.App. 1985).
>
> """Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense."""

Harris v. State, 2 So.3d 880, 905 (Ala.Crim.App. 2007).

Here, the trial court properly weighed the aggravating circumstances and the mitigating circumstances before determining Morris's sentence. The judge did not err in determining that the three aggravating circumstances that the murder was committed during the course of a robbery and a burglary §§ 13A-5-49 § 4)) and that Morris had previously been convicted of a violent felony (§ 13A-5-49(2)) outweighed the mitigating circumstances surrounding his character and background.

III.

Morris alleges that the charges against him should be dismissed because, he says, he was denied his constitutional right to a speedy trial. Morris argues that the six-year gap between his arrest and his first trial was presumptively prejudicial and was caused by the State's negligence. He further contends that he did not acquiesce to the delay and that he was prejudiced because the witnesses' memories may have been affected; moreover, certain witnesses may have disappeared.

Morris first raised this argument in his brief in his first appeal; therefore, any error must rise to the level of plain error. *See* Rule 45A, Ala.R.App.P. *see also Sharp v. State,* [Ms. CR-05-2371, August 29, 2008] __ So.3d __, __ (Ala.Crim.App. 2008).

The record indicates that Rochester's murder occurred on February 25, 1997, and that Morris was arrested for public intoxication on that same date. The arrest warrant charging him with Rochester's murder was issued on February 27, 1997. On March 31, 2003, jury selection began in Morris's first trial.[6] Thus, the delay between Morris's arrest and his trial was approximately 73 months.

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[6] This Court may take judicial notice of its records in Morris's first appeal. *Lee v. State,* [Ms. CR-07-0054, October 9, 2009] __ So.3d __, __ (Ala.Crim.App. 2009), citing *Hull v. State,* 607 So.2d 369, 371 (Ala.Crim.App. 1992).

"As the Alabama Supreme Court stated in *Ex parte Walker*, 928 So.2d 259, 263 (Ala. 2005):

> "'An accused's right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Art. I, § 6, of the Alabama Constitution, 1901. As noted, an evaluation of an accused's speedy-trial claim requires us to balance the four factors the United States Supreme Court set forth in *Barker* [*v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)]: "[l]ength of delay, the reason for the delay, the defendant's assertion of [her] right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (footnote omitted). See also *Ex parte Carrell*, 565 So.2d [104] at 105 [(Ala. 1990)]. "A single factor is not necessarily determinative, because this is a 'balancing test, in which the conduct of both the prosecution and the defense are weighed.'" *Ex parte Clopton*, 656 So.2d [1243] at 1245 [(Ala. 1985)] (quoting *Barker*, 407 U.S. at 530, 92 S.Ct. 2182, 33 L.Ed.2d 101). We examine each factor in turn.'

"(Footnotes omitted.)

"A. *Length of delay.* As the *Ex parte Walker* court stated concerning the length of the delay:

> "'In *Doggett v. United States*, the United States Supreme Court explained that the first factor—length of delay—"is actually a double enquiry." 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). The first inquiry under this factor is

whether the length of the delay is "'presumptively prejudicial.'" 505 U.S. at 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (quoting *Barker,* 407 U.S. at 530–31, 92 S.Ct. 2182, 33 L.Ed.2d 101). A finding that the length of delay is presumptively prejudicial "triggers" an examination of the remaining three *Barker* factors. 505 U.S. at 652 n. 1, 112 S.Ct. 2686, 120 L.Ed.2d 520 ("[A]s the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry."). *See also Roberson v. State,* 864 So.2d 379, 394 (Ala.Crim.App. 2002).

"'In Alabama, "[t]he length of delay is measured from the date of the indictment or the date of the issuance of an arrest warrant-whichever is earlier-to the date of the trial." *Roberson,* 864 So.2d at 394. Cf. § 15-3-7, Ala.Code 1975 ("A prosecution may be commenced within the meaning of this chapter by finding an indictment, the issuing of a warrant or by binding over the offender."); Rule 2.1, Ala.R.Crim.P. ("All criminal proceedings shall be commenced either by indictment or by complaint."). The length of the delay in this case was approximately 50 months: Walker was indicted on January 14, 2000, and she pleaded guilty on March 25, 2004. *See Carrell,* 565 So.2d at 107 (calculating the length of delay from defendant's indictment until his plea of guilty). The State concedes (and both the trial court and the Court of Criminal Appeals held) that the 50-

month delay in Walker's case was presumptively prejudicial.'

"928 So.2d at 263–64 (footnotes omitted)."

Belisle v. State, 11 So.3d 256, 271–72 (Ala.Crim.App. 2007), affirmed, 11 So.3d 323 (Ala. 2008), cert. denied, __ U.S. __, 129 S.Ct. 2865, 174 L.Ed.2d 582 (2009.)

Here, because the delay was 73 months, the delay was presumptively prejudicial. Accordingly, we examine the remaining factors set out in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

As to the reasons for the delay, "'[t]he State has the burden of justifying the delay.'" *Ex parte Anderson,* 979 So.2d 777, 780 (Ala. 2007). In the present case, the majority of the delays are attributable to Morris. Morris was arrested on February 25, 1997, and the case-action summary included in the record of Morris's first trial indicates that the case was assigned to the original trial court in December 1997. Morris was arraigned in January 1998, and the case was set for trial in May 1998. A number of motions were filed, largely by defense counsel, and subpoenas were issued, and his case was reset for trial on February 22, 1999. However, on February 10, 1999, Morris filed a motion for continuance until a psychiatric evaluation could be completed. The trial court ordered that Morris be evaluated for competency to stand trial and mental state at the time of the offense. Dr. Kimberly Ackerson was then appointed by

the trial court, and she examined Morris in May 1999. He was again examined for the same reasons by Dr. Clyde Williams. Both experts found Morris incompetent to stand trial, but determined that his competency could be restored through competency training. Thereafter, on November 11, 1999,[7] the State filed a motion to determine Morris's competency because the trial had been set for December 6, 1999.

Morris was found incompetent to stand trial by order dated February 21, 2001, and required to undergo competency training by the Alabama Department of Mental Health and Mental Retardation at Taylor Hardin Secure Medical Facility. Morris attended outpatient competency training sessions from March 9, 2001, until March 31, 2001. Morris's assessment scores failed to improve, and on June 22, 2001, Wyatt Rhone filed a competency-evaluation report indicating that he believed that Morris was purposefully giving false answers and malingering; therefore, on November 8, 2001, the State filed a motion requesting that Morris be placed into inpatient treatment, training, and evaluation. In that motion, the State argued that the case had been continued a number of times to determine Morris's competency and that there was still no basis on which to determine whether Morris had benefitted from the training or whether he was currently competent to stand

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[7] The case-action summary, however, despite the date stamped on the State's motion, reflects that the State filed this motion on November 15, 1999.

trial. Thus, the trial court ordered Morris to be committed to Taylor Hardin Secure Medical Facility on December 4, 2001, and he was committed on December 18, 2001. On January 31, 2002, Morris was diagnosed as competent to stand trial by Dr. Nagi, who also determined that Morris had been malingering. On July 26, 2002, the State again requested a competency hearing, which was held on December 9, 2002. Morris was determined to be competent on January 15, 2003, and the striking of the jury began on March 31, 2003.

Thus, almost four years of the delay were attributable to determining Morris's competency to stand trial. Moreover, it was concluded that for at least part of the treatment, he had been malingering. ""'Delays occasioned by the defendant or on his behalf are excluded from the length of the delay and are heavily counted against the defendant in applying the balancing test of *Barker*.'" *Ex parte Walker*, 928 So.2d at 265 (Ala. 2005) (quoting *Zumbado v. State*, 615 So.2d 1223, 1234 (Ala.Crim.App. 1993), quoting in turn *McCallum v. State*, 407 So.2d 865, 868 (Ala.Crim.App. 1981))." *Ex parte Anderson*, 979 So.2d at 781.

> "'*Barker v. Wingo* recognizes three categories of reasons for delay: (1) deliberate delay, (2) negligent delay, and (3) justified delay. 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101. Courts assign different weight to different reasons for delay. Deliberate delay is "weighted heavily" against the State. 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101. Deliberate delay includes an "attempt to de-

lay the trial in order to hamper the defense" or "'to gain some tactical advantage over (defendants) or to harass them.'" 407 U.S. at 531 & n. 32, 92 S.Ct. 2182, 33 L.Ed.2d 101 (quoting *United States v. Marion,* 404 U.S. 307, 325, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)). Negligent delay is weighted less heavily against the State than is deliberate delay. *Barker,* 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101; *Ex parte Carrell,* 565 So.2d [104,] 108 [(Ala. 1990)]. Justified delay--which includes such occurrences as missing witnesses or delay for which the defendant is primarily responsible—is not weighted against the State. *Barker,* 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101; *Zumbado v. State,* 615 So.2d 1223, 1234 (Ala.Crim.App. 1993) ("'Delays occasioned by the defendant or on his behalf are excluded from the length of delay and are heavily counted against the defendant in applying the balancing test of Barker.'") (quoting *McCallum v. State,* 407 So.2d 865, 868 (Ala.Crim.App. 1981)).'

"Contrary to the appellant's allegations in his brief to this court, there is not any indication that the State deliberately or negligently delayed the trial in any way. In fact, during several pre-trial hearings, the State expressed concern about not delaying the trial unnecessarily. Based on the record before us, it appears that very little of the delay was actually attributable to the State. Thus, 'we see no deliberate delay by the State to enhance its own case or to prejudice the defense.' *Irvin v. State,* 940 So.2d 331, 343 (Ala.Crim.App. 2005).

"Some of the delay in this case was caused by neutral reasons that are not attributable to either the State or the appellant. The investigation was completed, forensic analysis was performed, psychological testing was done, discovery was conducted, and numerous evidentiary matters were resolved. Neutral reasons for delay do not ordinarily require a dismissal of the case based on a violation of the right to a speedy trial. *See Pierson v. State*, 677 So.2d 830, 831 (Ala.Crim.App. 1996).

"....

"....

"... Thus, the majority of the delay was justified delay that was attributable to the appellant and/or to the trial court, and it weighs heavily against the appellant rather than against the State."

Sharp v. State, [Ms. CR-05-2371, August 29, 2008] __ So.3d __, __ (Ala.Crim.App. 2008).

Because the majority of the delays were the result of motions filed by Morris concerning his competency and there was no indication of unjustified delays or negligence on this ground by the State, this reason for the delay is not weighed against the State, but rather against Morris. *See Belisle v. State*, 11 So.3d at 272 ("It appears that the majority of the delays were due to motions filed by Belisle. 'Justified delay-which includes such occurrences as missing witnesses or delay for which the defendant is primar-

ily responsible-is not weighted against the State. *Barker,* 407 U.S. at 531, 92 S.Ct. 2182, 33 L.Ed.2d 101.' *Ex parte Walker,* 928 So.2d 259 at 265 (Ala. 2005).") *See also Blackmon v. State,* 7 So.3d 397, 448 (2005), cert. denied, __ U.S. __, 129 S.Ct. 2052, 173 L.Ed.2d 1136 (2009) ("It appears that a good portion of the delays were based on motions filed by Blackmon."). *See also Sharifi v. State,* 993 So.2d 907, 924 (Ala.Crim.App. 2008), cert. denied, __ U.S. __, 129 S.Ct. 491, 172 L.Ed.2d 386 (2008) ("The record shows that the circuit court took every precaution to ensure that Sharifi was granted a fair trial. It is clear that the majority of the delays were due to the court's desire to make every resource available to Sharifi before he faced trial on the capital charge.").

Morris did not assert his right to a speedy trial until the appeal from his first trial. In *Belisle v. State,* 11 So.3d at 272, where Belisle did not assert his right to a speedy trial until 10 months before he was tried, this Court stated:

> "'An accused does not waive the right to a speedy trial simply by failing to assert it. *Barker,* 407 U.S. at 528, 92 S.Ct. 2182, 33 L.Ed.2d 101. Even so, courts applying the *Barker v. Winqo* factors are to consider in the weighing process whether and when the accused asserts the right to a speedy trial, 407 U.S. at 528–29, 92 S.Ct. 2182, 33 L.Ed.2d 101, and not every assertion of the right to a speedy trial is weighted equally. Compare *Kelley v. State,* 568 So.2d 405, 410 (Ala.Crim.App. 1990) ("Repeated requests for a speedy trial weigh heavily in favor of an ac-

> cused."), with *Clancy v. State*, 886 So.2d 166, 172 (Ala.Crim.App. 2003) (weighing third factor against an accused who asserted his right to a speedy trial two weeks before trial, and stating: '"The fact that the appellant did not assert his right to a speedy trial sooner "tends to suggest that he either acquiesced in the delays or suffered only minimal prejudice prior to that date."'") (quoting *Benefield v. State*, 726 So.2d 286, 291 (Ala.Crim.App. 1997), additional citations omitted), and *Brown v. State*, 392 So.2d 1248, 1254 (Ala.Crim.App. 1980) (no speedy-trial violation where defendant asserted his right to a speedy trial three days before trial).'

"*Ex parte Walker*, 928 So.2d at 265–66."

Moreover, in *Sharp v. State*, supra, Sharp failed to raise this issue in a pretrial motion for a speedy trial. Instead, he raised this contention in a post trial motion for a judgment of acquittal. This Court quoted *Irvin v. State*, 940 So.2d 331, 343 (Ala.Crim.App. 2005), stating:

> '"Irvin failed to assert his constitutional right to a speedy trial below. The record contains no motion for a speedy trial. In *Barker v. Wingo*, the Supreme Court recognized, "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 532, 92 S.Ct. 2182, 33 L.Ed.2d 101. Likewise, this Court has held:

> """Since there was no effort on the part of the appellant to secure his right to a speedy trial ... he may not complain of any delay on appeal.' *Tidmore [v. City of Birmingham]*, 356 So.2d [231,] 233 [(Ala.Crim.App. 1977)]. While a defendant who fails to demand a speedy trial does not forever waive his right, this is one factor which must be considered."
>
> "'*Bailey v. State,* 375 So.2d 519, 523 (Ala.Crim.App. 1979). In *Turner v. State,* 924 So.2d 737, 748 (Ala.Crim.App. 2002), this Court recognized that the failure of the defendant to assert his right to a speedy trial weighed against a finding of plain error regarding this claim.'"

__ So.3d at __.

Because Morris did not assert this right until the appeal from his first trial, this factor must weigh against him.

Finally, Morris has failed to show any prejudice as a result of this delay. He alleges in his brief on appeal that he did not acquiesce to this delay and that the delay may have resulted in diminished memories of the witnesses. He, however, does not present any specific example of such a diminished memory. He alludes to the fact that the paramedic's notes were destroyed, but there is no indication in the record that this in any way affected her testimony.

He also claims that certain witnesses may have disappeared and states that defense counsel attempted to subpoena three Huddle House restaurant employees before Morris's first trial, who could have testified that he was present there on the night of the offense. However, even if Morris had been to the Huddle House restaurant, that does not negate his commission of the offense on the same night. He also speculates that the police officer who had guarded the door to Rochester's house, who could not be identified at trial, may have confirmed that Rochester's dog left the house on the morning following the offense. Thus, he speculates that the dog could then have transferred the blood to Morris's shoe. This possible evidence, he claims, would have refuted the State's evidence that the dog did not leave the house. However, this claim is clearly conjecture based on more conjecture.

These cited instances by Morris are speculation and fail to show any resulting prejudice. Moreover, because the State acted with due diligence in attempting to timely bring Morris to trial, he has failed to meet his burden of proving prejudice. "'[W]here the state pursues the accused "with reasonable diligence," the delay-however long-generally is excused unless the accused demonstrates "specific prejudice to his defense." *Doggett v. United States*, 505 U.S. 648 (1992), 112 S.Ct. [at] 2686. Thus, when the state acts with reasonable diligence in bringing the defendant to trial, the defendant has the burden of proving prejudice caused by the delay.'" *Sharp v. State*, __ So.3d at __, quoting *Ex parte Walker*, 928 So.2d at 267. "Appellant must point to specific facts in evi-

dence to support his claim. *United States v. Radue*, 707 F.2d 493, 495 (11th Cir.), cert. denied, 464 U.S. 916, 104 S.Ct. 281, 78 L.Ed.2d 259 (1983). '[S]peculative allegations, such as general allegations of loss of witnesses and failure of memories, are insufficient to demonstrate the actual prejudice....' *United States v. Butts*, 524 F.2d 975, 977 (5th Cir. 1975), citing *United States v. McGough*, 510 F.2d 598, 604 (5th Cir. 1975)." *Haywood v. State*, 501 So.2d 515, 518 (Ala.Crim.App. 1986). *See also Lawson v. State*, 954 So.2d 1127, 1134–35 (Ala.Crim.App. 2006). Because Morris has failed to show any prejudice based on the delay, this factor must be weighed against him.

After reviewing Morris's claim that his constitutional right to a speedy trial had been violated by the delay between his arrest and first trial, and evaluating and weighing the *Barker* factors, there was no plain error on this ground.

IV.

Morris argues that his conviction should be overturned because the State was allowed to introduce an unreliable witness identification of him based on an impermissibly suggestive one-man showup. He alleges that the identification of him by the paramedic on the morning following the offense was unduly suggestive, was not independently reliable, and was not harmless error.

The record indicates that, when the paramedic responded to the call at Rochester's home, the para-

medic informed the police about the man she had seen earlier at that location who had attempted to gain entry into the house and to learn the details of the first emergency call involving Russell. She gave them a description of the man, and when Morris, who matched the description, was seen by an officer later that morning in the area of the offense, the paramedic was taken to view and possibly identify Morris as that man.

She testified that, at approximately 9:00 p.m. during the initial emergency call, after she first began speaking with the man, he approached her on the walkway to the house. As they spoke, he attempted to walk around her, but she blocked him. At that time, they were standing "literally toe to toe." (R. 205.) She estimated that their faces were less than 24 inches apart. (R. 205.) After he had been instructed to leave and appeared to have done so, the paramedic again saw him when she had stepped down from the back of the ambulance. She testified that he was on the sidewalk within 10 feet of her when he was again instructed to leave. (R. 210-11.) As to her ability to clearly see the man, she stated that there was lighting from the house, a street light, and lights from the fire and rescue vehicles called "scene lights." (R. 212.) She also testified that "I'm fairly certain that it was a pretty good moon that night but it was very clear for me to be able to see him." (R. 212.)

After giving the police a description of the man and the clothes he was wearing during her second dispatch, which occurred around midnight, she was

taken to the location where Morris was arrested for public intoxication, between 4:00 and 5:00 a.m., by police car. She was asked to view the man, but she testified that the officers "never said that it was the person or anything like that." (R. 222.) She stated that "I looked at him and realized who he was, I knew who he was." (R. 222.) She stated that she recognized him as the man she had confronted earlier, but that, out of an abundance of caution, she planned on requesting that the officers order him to speak. He began talking and "fussing" before she could do so, and she testified that "I knew when I saw him that it was him, but that was just a confirmation to me that it was him." (R. 223.) The paramedic stated that she identified the man to the officers and told them that laceration on the man's forehead had not been there earlier. (R. 223.) She again identified Morris at trial as the man that she had seen on those two occasions "without a doubt." (R. 225.)

In the present case, the one-man showup was conducted approximately four hours after the paramedics informed the police about the man who had earlier been present at the scene of the offense, and approximately seven hours after she had seen him. She was shown only Morris to identify.

"In *Ex parte Appleton*, 828 So.2d 894 (Ala. 2001), this Court noted:

> "'"The danger inherent in a one-man showup, where a witness is shown a single suspect and asked, 'Is that the man?' is twofold. First, a one-man showup conveys a clear message that 'the po-

> lice suspect this man.' Second, a one-man showup does not give the witness a choice of identifying another person as being the perpetrator of the crime charged. Consequently, when a one-man showup is used to identify the perpetrator of a crime, the reliability of the witness's identification is not put to an objective test, such as a live or photographic lineup, in which a single suspect must be chosen from a group of persons possessing similar physical characteristics.'"
>
> "828 So.2d at 899–900 (quoting *Ex parte Frazier,* 729 So.2d at 254–55 (citations omitted) (emphasis omitted))."

Ex parte Wimes, 14 So.3d 131, 134 (Ala. 2008). However, despite the susceptibility to unreliability a one-man showup presents, ""'it is permitted where conducted promptly after the commission of a crime or demanded by necessity, emergency, or exigent circumstances.'"" *Gavin v. State,* 891 So.2d 907, 959 (Ala.Crim.App. 2003), cert. denied, 891 So.2d 998 (Ala. 2004), cert. denied, *Gavin v. Alabama,* 543 U.S. 1123, 125 S.Ct. 1054, 160 L.Ed.2d 1073 (2005), quoting *Ex parte Appleton,* 828 So.2d 894, 900 (Ala. 2001), quoting in turn *Brazell v. State,* 369 So.2d at 29.

Moreover, the clear import of evaluating the procedures employed in pretrial identifications, as well as identification testimony, is to determine reliability. There are two prongs involved in this evaluation; the first addresses the suggestiveness of the initial identification.

"The second prong of the *Brazell* [*v. State,* 369 So.2d 25, 28–29 (Ala.Crim.App. 1978)] test requires us to address whether the '"procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification' ... or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification' ... that allowing the witness to make an in-court identification would be a denial of due process."' *Brazell,* 369 So.2d at 28–29 (quoting *United States ex rel. Phipps v. Follette,* 428 F.2d 912, 914-15 (2d Cir. 1970)). We evaluate the likelihood of misidentification under the five factors set forth in *Neil v. Biggers*[, 409 U.S. 188, 93 S.Ct. 375, 94 L.Ed.2d 401 (1972)]:

> "'[1] [T]he opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.'

"409 U.S. at 199–200, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (emphasis omitted)."

Ex parte Wimes, 14 So.3d at 134–35.

Here, even if the initial showup was unduly suggestive, the paramedic's testimony reveals that the circumstances surrounding her observing and hearing Morris support the reliability of her identifica-

tion. She testified to the duration of the confrontation, her proximity to Morris during the confrontation, and the good lighting conditions. Her testimony clearly indicated a high degree of attention to him due to her role as a caregiver whose responsibilities, she testified, included protecting the equipment; especially in light of his aggressive and unruly behavior. She described Morris as approximately five feet and eight inches tall, medium build, dark complexion, and "not real clean shaven." (R. 217–18.) She stated that he was wearing a baseball cap, a sateen jacket, and possibly a sweatshirt. She also described "what we would now call desert camo sand, the brown tones of the camouflage pants and tennis shoes." (R. 217–18.) Further, her testimony confirms the certainty of this identification. Finally, all of these bases of her identification happened within approximately seven hours and were part of her single shift.

"As this Court noted in *O'Dell v. State*, 482 So.2d 1341 (Ala.Crim.App. 1985):

> "'"[I]t is settled law that prompt, on-the-scene confrontations are not constitutionally impermissible, but are consistent with good police work." (Citations omitted.) *Hobbs v. State*, 401 So.2d 276, 279 (Ala.Cr.App. 1981). A prompt on-the-scene identification of a suspect increases the reliability of the identification under the following rationale:
>
> "'"[T]he police action in returning the suspect to the vicinity of the crime for immediate identification in circumstances such as these fosters the

> desirable objectives of fresh, accurate identification which in some instances may lead to the immediate release of an innocent suspect and at the same time enable the police to resume the search for the fleeing culprit while the trail is fresh." *Id.* at 280, quoting *Bates v. United States,* 405 F.2d 1104 (D.C.Cir. 1968).'

"482 So.2d at 1346."

Gavin v. State, 891 So.2d at 960.

Here, the factors enumerated in *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), all support the reliability of the paramedic's identification of Morris as the man she had confronted at the scene of the offense only hours before the murder. Thus, even if the one-man showup had been unduly suggestive, it did not taint her identification as it did not invite an irreparable misidentification. *Ex parte Appleton,* 828 So.2d at 900; *Brazell v. State,* 369 So.2d 25, 29 (Ala.Crim.App. 1978).

V.

Morris argues that the trial court repeatedly and improperly admonished him in front of the jury. He refers to instances during his testimony of conversations he had had with police officers when the trial court admonished him to testify only as to what he and the officer did rather than what was said. Morris contends that this testimony was not hearsay because it was not being offered to prove the truth of the matters asserted. Further, he contends that the

trial court's actions diminished his credibility with the jury and left him unable to fully present his testimony to the jury.

Morris failed to object to any of these instances at trial; in fact, defense counsel indicated that he agreed that Morris was attempting to give hearsay testimony and instructed him accordingly. Therefore, this issue is to be analyzed under the plain-error rule. Rule 45A, Ala.R.App.P.

This testimony by Morris was restricted as to what he was told by a police officer as he was recounting his arrest and identification by the paramedic. All the statements from the officer were instructions or informational to Morris to facilitate Morris's arrest.

"Rule 801(c), Ala. R. Evid., reads:

> "'"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'

"Rule 802, Ala. R. Evid., provides that

> "'[h]earsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute.'"

Ex parte Baker, 906 So.2d 277, 283 (Ala. 2004), on remand, 906 So.2d 292 (Ala.Crim.App. 2005).

The trial court's restrictions on Morris's testimony concerned out-of-court statements made by a police officer.[8] *See generally Vaughn v. State,* [Ms. CR-08-0485, August 7, 2009] __ So.3d __, __ (Ala.Crim.App. 2009) ("Testimony from Officer Shultz regarding what the victim told him constituted hearsay; the nonhearsay portion of his testimony—what he observed when he arrived at the scene—did not constitute substantive evidence necessary to support a revocation of probation."). Cf. *White v. State,* 900 So.2d 1249, 1261 (Ala.Crim.App. 2004) ("His only objection seems to be that Slaton was permitted to testify about hearsay, but Slaton did not testify about what Thompson told him, only that he met Thompson at the location where Newton had testified she met Thompson.... Slaton's testimony about what he did was not hearsay.").

Even if this testimony might have been admissible because it was being offered not "to prove the

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[8] The trial court also stated that it would not allow Morris to give renditions of his out-of-court conversations because he would not be allowed to "make a speech" but rather must "answer questions." (R. 442.) There was no error in this statement by the trial court. *Hodges v. State,* [Ms. CR-04-1226, March 23, 2007] __ So.3d __, __ (Ala.Crim.App. 2007) (trial counsel was not ineffective for failing to object to the trial court's instructions to Hodges to "stop making statements" and "simply answer the questions he was asked." There was also no merit to the claim. "Hodges made an unsolicited comment to the prosecutor, then asked the court if he could make a statement. The trial court is vested with much discretion to control the proceedings in its courtroom and to ensure that proper decorum is maintained.").

truth of whatever facts might be stated, 'but rather to establish the reason for action or conduct by the witness,'" *Grayson v. State,* 824 So.2d 804, 813 (Ala.Crim.App. 1999), quoting *Edwards v. State,* 502 So.2d 846, 849 (Ala.Crim.App. 1986), quoting in turn *Tucker v. State,* 474 So.2d 131, 132 (Ala.Crim.App. 1984), rev'd on other grounds, 474 So.2d 134 (Ala. 1985), its omission was harmless. Morris was not prevented from or restricted in testifying as to his account of the events. For example, although, as a result of the objections he changed his testimony to state that he got out of the police car for the paramedic to look at him, rather than testifying that the officer told him to do so, the subject matter of the testimony remained the same.

There is no indication in the record that these instructions in any way limited Morris's testimony. Any error on this basis was harmless, and Morris's substantial rights were not probably affected by these restrictions. "No judgment may be reversed or set aside, nor new trial granted ... on the ground of misdirection of the jury ... or the improper ... rejection of evidence ... unless in the opinion of the court to which the appeal is taken or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties." Rule 45, Ala.R.App.P. *See also O.A.C. v. State,* 851 So.2d 146, 152 (Ala.Crim.App. 2002) (trial court did not erroneously prevent appellant from testifying as he "failed to make the necessary threshold showing that the evidence he sought to introduce was sufficiently probative with respect to his claimed defense,

so as to tip the balance in favor of admitting the evidence on the basis of his constitutional right to present a defense."); *Williams v. State,* 531 So.2d 49 (Ala.Crim.App. 1988) (any error in the trial court's limitation of examination of defense witness concerning victim's intoxication was harmless); *King v. State,* 929 So.2d 1032, 1039–40 (Ala.Crim.App. 2005) (trial court's limitation of King's cross-examination of his wife, if error at all, was harmless).

We find no plain error as to this claim.

VI.

Morris argues that the Eighth Amendment to the United States Constitution prohibits his execution because his previous trial resulted in a hung jury. Morris raises this issue for the first time on appeal; therefore, it is due to be analyzed under the plain-error rule. Rule 45A, Ala.R.App.P.

Morris's second trial ended when the trial court declared a mistrial because the jury was unable to reach a verdict. Although Morris contends that this fact should disallow any future sentence of death as to the same offense, there is no legal support for Morris's argument.

In *State v. Woods,* 382 S.C. 153, 676 S.E.2d 128 (2009), Woods's first trial ended in a hung jury and mistrial, and he was retried and sentenced to death. In addressing whether a change of venue was appropriate for the second trial based on the trial court's holding in the first trial, the court stated:

"A mistrial is the equivalent of no trial and leaves the cause pending in the circuit court. *State v. Smith,* 336 S.C. 39, 518 S.E.2d 294 (Ct.App. 1999). It leaves the parties 'as though no trial had taken place.' *Grooms v. Zander,* 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (rulings of trial judge in proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in status quo ante). A court ruling as to admissibility and competency of testimony during a trial which is later declared a mistrial results 'in no binding adjudication of the rights of the parties.' *Keels v. Powell,* 213 S.C. 570, 572, 50 S.E.2d 704, 705 (1948).

"....

"Here, the case having resulted in a mistrial, it was a nullity and therefore began anew when called again for trial. *State v. Mills,* 281 S.C. 60, 314 S.E.2d 324, cert. denied 469 U.S. 930, 105 S.Ct. 324, 83 L.Ed.2d 261 (1984) (when mistrial occurs because of inability of jury to agree on verdict, it is the same as if no trial took place)."

382 S.C. at 157–58, 676 S.E.2d at 131. *See e.g. State v. Manning,* 329 S.C. 1, 495 S.E.2d 191 (1997) (wherein Manning was sentenced to death for murdering a state trooper and his conviction was reversed on appeal, leading to a second trial, which resulted in a mistrial because the jury could not reach a decision); *People v. Hovarter,* 44 Cal.4th 983, 81 Cal.Rptr.3d 299, 189 P.3d 300 (Cal. 2008) (wherein

jury was unable to reach a verdict as to penalty in Hovarter's first trial for capital murder committed during a rape and kidnapping, resulting in a mistrial and he was retried and convicted and sentenced to death); *Hogan v. State,* 139 P.3d 907, 948–49 (Okla.Crim.App. 2006) ("Where a capital-stage jury becomes 'deadlocked' during its deliberations, this is not an 'acquittal' on the death penalty. Hence the State can re-pursue the death penalty in a re-sentencing or retrial in the same case. Thus *Sattazahn [v. Pennsylvania,* 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003)] applies the same rule to capital-stage 'hung juries' that the Court has consistently applied to hung juries in the guilt stage." (footnotes omitted)).

The rationale in *Hammond v. State,* 776 So.2d 884 (Ala.Crim.App. 1998), in which this Court found plain error in the prosecutor's comment referencing Hammond's previous trial, is applicable to this issue:

> "We hold that at the sentencing phase of a second or subsequent capital murder trial, it is reversible error for the prosecution to comment on the result of a defendant's previous trial for the same offense. *Frazier v. State,* 632 So.2d 1002, 1007 (Ala.Cr.App. 1993). It does not matter that trial counsel did not preserve this error for review; we find the error to be plain error. Rule 45A, Ala.R.App.P; *Tomlin v. State,* 591 So.2d 550 (Ala.Cr.App. 1991); *Frazier v. State,* supra. This is especially so when the prosecution informs the jury that a previous jury recommended, and a previous judge imposed, the death penalty. In determining whether Hammond

> should receive the death penalty or life imprisonment without parole, this jury was aware of how another jury had resolved this very issue-adversely to the defendant. If a juror was uncertain as to whether aggravating circumstances existed, or, if found to exist, whether they outweighed the mitigating circumstances, the knowledge that 12 other people had determined that it did could have swayed the juror's verdict in favor of death. Further, the jury's awareness of Hammond's previous death sentence would diminish its sense of responsibility and mitigate the serious consequences of its decision. *People v. Hope,* 116 Ill.2d 265, 274, 508 N.E.2d 202, 205, 108 Ill.Dec. 41, 45 (Ill. 1986)."

776 So.2d at 892.

There is no prohibition against a death sentence in a second trial where a capital defendant's first trial resulted in a mistrial attributable to a hung jury. In such a situation, a capital defendant is tried anew with a new jury. The previous jury's determinations are neither attributable to nor to be considered by the later jury. Thus, there was no plain error on this ground.

VII.

Morris argues that his sentence contravened *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), because the jury did not determine whether he is mentally retarded; the jury did not unanimously find that the aggravating circum-

stances existed; and the jurors were instructed that their verdict was only a recommendation.

Morris failed to raise these issues at the trial court level; therefore, this issue is due to be evaluated under the plain-error rule. Rule 45A, Ala.R.App.P.

Initially, we note that the jury's finding of guilt of the capital offenses containing, by definition, two aggravating circumstances indicates that the jury unanimously found the existence of these two aggravating circumstances. Specifically, in this case, the jury unanimously found the existence of the aggravating circumstances that the murder was committed while Morris was engaged in the commission of the burglary and of the robbery of Rochester by finding him guilty of the capital offenses of murder during a burglary and murder during a robbery. § 13A-5-49(4), Ala.Code 1975; § 13A-5-40(a)(2) and (4), Ala.Code 1975. Furthermore, the trial court instructed the jury that it could not vote on the death penalty unless it found the existence of at least one aggravating circumstance. (R. 592.)

> "'The Supreme Court has held, in numerous cases, that the jury's verdict finding a defendant guilty of capital murder during the guilt phase of his trial, indicated that the jury had unanimously found a proffered aggravating circumstance included within the § 13A-5-40(a), Ala.Code 1975, definition of the particular capital-murder offense charged in the indictment. See, e.g., *Ex parte Hodges,* 856 So.2d 936 (Ala. 2003); *Ex parte Waldrop,* 859 So.2d 1181

(Ala. 2002); *Stallworth v. State,* 868 So.2d 1128 (Ala.Crim.App. 2001) (opinion on return to second remand), cert. denied, 868 So.2d 1189 (Ala. 2003). But see *Ex parte McGriff,* 908 So.2d 1024, 1039 (Ala. 2004) (authorizing prospective use of a penalty-phase special interrogatory). Moreover, in *Ex parte McNabb,* 887 So.2d 998 (Ala. 2004), the Supreme Court held that even a nonunanimous recommendation of death by the jury proved that the jury, including the jurors who voted against the recommendation of death, had unanimously found the existence of a proffered aggravating circumstance, even though the circumstance was not included within the definition of the particular capital-murder offense charged in the indictment, because the trial court had specifically instructed the jury that it could not proceed to a vote on whether to impose the death penalty unless it had already unanimously agreed that the aggravating circumstance existed. Because the jury recommended by a vote of 10–2 that Lewis be sentenced to death, it is clear that it unanimously found the existence of at least one aggravating circumstance.'"

Sharifi v. State, 993 So.2d 907, 940–41 (Ala.Crim.App. 2008), cert. denied, __ U.S. __, 129 S.Ct. 491, 172 L.Ed.2d 386 (2008), quoting *Lewis v. State,* [Ms. CR-03-0480, April 28, 2006] __ So.2d __, __ (Ala.Crim.App. 2006). *See Newton v. State,* [Ms. CR-05-1517, October 2, 2009] __ So.3d __, __ (Ala.Crim.App. 2009) (""'We note that *Ring* requires only that the jury unanimously find the existence of an aggravating circumstance in order to make the defendant death-eligible.'").

Thus, it is clear that the jury unanimously found the existence of two aggravating circumstances. Therefore, there was no violation of *Ring v. Arizona*, supra.

Moreover, as Morris concedes, Alabama does not require that a jury in a capital case make a determination of whether the defendant was mentally retarded. "[N]othing in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), or in *Ex parte Perkins*, 851 So.2d 453 (Ala. 2002), requires a jury determination of mental retardation." *Beckworth v. State*, 946 So.2d 490, 510 (Ala.Crim.App. 2005).

As to Morris's claim that the trial court violated *Ring v. Arizona*, supra, by improperly instructing the jury that its sentencing decision was only a recommendation, this issue has previously been decided adversely to Morris. In *Smith v. State*, [Ms. CR-97-1258, January 16, 2009] __ So.3d __ (Ala.Crim.App. 2000) (opinion on return to forth remand), this Court stated:

> "We addressed this same issue in *Duke v. State*, 889 So.2d 1, 43 (Ala.Crim.App. 2002), vacated on other grounds, 544 U.S. 901, 125 S.Ct. 1588, 161 L.Ed.2d 270 (2005), and stated:
>
> > "'Duke also argues that *Ring* [*v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002),] requires penalty-phase relief when the jury is told that its verdict is "advisory" or merely a "recom-

mendation." Contrary to Duke's contention, *Ring* does not address the advisory nature of a jury's sentencing recommendation. Duke's jury was properly informed that under Alabama law, its verdict was an advisory one. See § 13A-5-46, Ala.Code 1975. Thus, the jury was not misled regarding its role in the sentencing decision. See *Caldwell v. Mississippi,* 472 U.S. 320, 328–29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); *Ex parte Taylor,* 666 So.2d 73, 88 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996).'

"See also *Irvin v. State,* 940 So.2d 331 (Ala.Crim.App. 2005)."

__ So.3d at __ (footnote omitted).

Therefore, Morris's sentencing did not violate *Ring v. Arizona,* supra.

VIII.

Morris argues that the trial court improperly instructed the jury concerning its consideration of the aggravating and mitigating circumstances. Specifically, Morris contends that the trial court erred by failing to instruct the jury that it was required to unanimously find the existence of at least one particular aggravating circumstance and that it did not have to be unanimous in its decision as to the mitigating circumstances. Moreover, Morris alleges that the trial court failed to instruct the jury that it must recommend a sentence of life imprisonment without

parole if it found that the aggravating circumstances and the mitigating circumstances were of equal weight.

These issues are being raised for the first time on appeal; and therefore, they must be evaluated under the plain-error rule. Rule 45A, Ala.R.App.P.

However, because the jury unanimously found beyond a reasonable doubt during the guilt stage that Morris committed a murder during the course of a burglary and during the course of a robbery, the jury unanimously found during the penalty phase the aggravating circumstances contained in these offenses. As this Court stated in *Newton v. State,* supra, when Newton argued that the trial court had violated his Eighth and Fourteenth Amendment rights by failing to instruct the jury that it had to be unanimous as to its findings concerning aggravating circumstances:

"We addressed and rejected a similar argument in *Blackmon v. State,* 7 So.3d 397, 432–33 (Ala.Crim.App. 2005), as follows:

"'Blackmon also argues that her death sentence violates *Ring* because the jury was not instructed that it had to unanimously determine the existence of the aggravating circumstance and the weight that should be assigned to that aggravating circumstance. Again, in *Duke* we stated:

"'"We note that *Ring* requires only that the jury unanimously find the existence of an aggravating

> circumstance in order to make the defendant death-eligible. Alabama law does not require that the jury's advisory verdict be unanimous before it can recommend death. See § 13A-5-46(f), Ala.Code 1975. Nothing in *Ring* supports Duke's claim the jury's advisory verdict be unanimous." *Duke,* 889 So.2d at 43 n. 4.'
>
> "During the guilt phase of the trial, the jury unanimously found beyond a reasonable doubt that Newton committed a murder during the course of committing a robbery. 'The jury's unanimous finding of one aggravating circumstance is sufficient to satisfy *Ring.*' *Ex parte McNabb,* 887 So.2d 998, 1006 (Ala. 2004). Therefore, Newton's argument is without merit."

__ So.3d at __.

This Court also addressed Newton's claim that his constitutional rights had been violated by the trial court's failure to instruct the jury that it did not have to be unanimous in its decision as to the mitigating circumstances. In finding no plain error on this ground, the Court stated:

> "We addressed a similar argument in *Smith v. State,* 795 So.2d 788, 835–36 (Ala.Crim.App. 2000), as follows:
>
> > "'Smith also argues that the trial court's failure to instruct the jury that its finding as to mitigating circumstances did not have to be unanimous, implied that the mitigating circumstances had to

be unanimous. There was no objection raised at trial concerning the court's failure to instruct that the jury's finding did not have to be unanimous. We review this issue for plain error. Rule 45A, Ala. R.App. P.

"'A review of the jury's instruction on mitigating circumstances does not reflect that the trial court instructed the jury that its decision that evidence was mitigating had to be unanimous. The trial court instructed that jury in accordance with the Alabama Proposed Pattern Jury Instructions for Use in the Guilt Stage of Capital Cases Tried Under Act No. 81-178.

"'As we recently stated in *Hall v. State*, 820 So.2d 113 (Ala.Cr.App. 1999):

"'"This Court addressed a similar issue in *Freeman v. State*, 776 So.2d 160 (Ala.Cr.App. 1999):

"'"'Freeman also contends that the trial court erred by failing to instruct the jury that its findings as to mitigating circumstances did not have to be unanimous. In failing to so instruct the jury, he says, the trial court implied that the jurors had to unanimously agree before they could find the existence of a mitigating circumstance. Freeman did not object at trial to the trial court's instructions to the jury concerning mitigating circumstances; therefore, we will review this claim under the plain error rule. Rule [45A,] Ala. R.App. P.'

> ""'We have reviewed the trial court's instructions to the jury; we find nothing in the instructions that would have suggested to the jurors, or given them the impression, that their findings concerning the existence of mitigating circumstances had to be unanimous. See *Coral v. State*, 628 So.2d 954, 985 (Ala.Cr.App. 1992), aff'd, 628 So.2d 1004 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994); *Windsor v. State*, 683 So.2d 1027 (Ala.Cr.App. 1994), aff'd, 683 So.2d 1042 (Ala. 1996), cert. denied, 520 U.S. 1171, 117 S.Ct. 1438, 137 L.Ed.2d 545 (1997).'"'

__ So.3d at __.

In the present case, a review of the trial court's instructions to the jury concerning its duty in finding mitigating circumstances reveals that there is no "reasonable likelihood or probability" that the jurors might have believed that they were required to unanimously find the existence of any particular mitigating circumstance. Thus, there was no error.

Morris also claims that the trial court's instruction failed to charge the jury that if it found that the weight of the aggravating circumstances and the mitigating circumstances was equal, it must recommend a sentence of life imprisonment without the possibility of parole. However, the instructions given by the trial court in the present case were essentially identical to those given in *Ex parte McNabb*, 887 So.2d 998, 1001 (Ala. 2004), in which they were

found to be harmless. In discussing *McNabb* decision, this court has written:

> "The Alabama Supreme Court addressed this issue in *Ex parte McNabb,* 887 So.2d 998 (Ala. 2004). In that case, the trial court instructed the jury as follows during the sentencing phase of the trial:
>
> > "'[I]f, after a full and fair consideration of all of the evidence in the case, you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist and you are convinced that the aggravating circumstance outweighs the mitigating circumstances, then your verdict would be: "We, the jury, recommend that the defendant be punished by death, and the vote is as follows...." However, if after a full and fair consideration of all of the evidence in this case, you determine that the mitigating circumstances outweigh any aggravating circumstance or circumstances that exist, or you are not convinced beyond a reasonable doubt that at least one aggravating circumstance does exist, your verdict should be to recommend the punishment of life imprisonment without parole....'
>
> "*McNabb,* 887 So.2d at 1001. Thus, just as in this case, the language used in instructing the jury in *McNabb* did not specifically instruct the jury on what to do if the aggravating circumstances and mitigating circumstances were in balance.
>
> "The Alabama Supreme Court held that although the trial court did not instruct the jury as to what

to do when the mitigating circumstances and the aggravating circumstances were in balance, 'the jury [in McNabb] was not invited to recommend a sentence of death without finding any aggravating circumstance.' *Id.* at 1004. The Supreme Court then held that, in considering the jury charge in its entirety, it could not conclude that 'the error "seriously affect[ed] the fairness, integrity or public reputation of [these] judicial proceedings," Ex parte Davis, 718 So.2d at 1173–74, so as to require a reversal of the sentence.' *McNabb,* 887 So.2d at 1004."

Sale v. State, 8 So.3d 330, 349 (Ala.Crim.App. 2008), cert. denied, 8 So.3d 352 (Ala.2008), cert. denied, __ U.S. __, 129 S.Ct. 2062, 173 L.Ed.2d 1141 (2009).

Here, a review of the complete instructions given by the trial court reveals that there is no indication that the fairness of the sentencing proceedings was in any way affected. The jury was informed as to its role in weighing its findings as to the aggravating circumstances and the mitigating circumstances. Thus, there was no plain error as to this issue.

IX.

Morris argues that the prosecutor made improper statements in his opening and closing arguments, in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Morris failed to object to any of these alleged improper remarks at trial; therefore, any error must rise to the level of plain error. Rule 45A, Ala.R.App.P.

A.

Morris contends that the prosecutor improperly prejudiced him in front of the jury by making the following argument concerning conflicting evidence between certain State's witnesses and the evidence offered by the defense:

> "If you believe the defense and you believe Alfonzo Morris you must also believe two additional things. You must believe that Officer Smith and Officer Shirley Jackson conspired to swap those cigarettes somehow and that they lied to you, both of them, on the stand."

(R. 516.)

This comment by the prosecutor was merely referring to certain conflicts in the evidence offered by the State and the evidence offered by the defense. The officers referred to testified that a cigarette found at the scene of the offense contained Morris's DNA. Morris testified that at the time of his arrest the arresting officer took a cigarette from him that Morris had had in his mouth. Morris testified that "the only cigarette that had my DNA on it is the cigarette he took out of my mouth-I mean, out of my pocket what I had in my mouth at the time of the arrest." (R. 446.)

> "The prosecutor properly argued to the jury evidence that contradicted that defense. The prosecutor has a right to present his impressions from the

> evidence. See *Taylor v. State,* 666 So.2d 36, 64 (Ala.Cr.App.), remanded on other grounds, opinion extended and aff'd on return to remand, 666 So.2d 71 (Ala.Cr.App. 1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996). The prosecutor may comment on proper inferences to be drawn from the evidence and may draw conclusions based on his or her own reasoning. *Id.*"

Gamble v. State, 791 So.2d 409, 431 (Ala.Crim.App. 2000). *See Ferguson v. State,* 814 So.2d 925,946–47 (Ala.Crim.App. 2000), affirmed, 814 So.2d 970 (Ala. 2001), cert. denied, 535 U.S. 907, 122 S.Ct. 1208, 152 L.Ed.2d 145 (2002) (holding that prosecutor can draw inferences and deductions from the evidence although Ferguson argued that prosecutor improperly "'offered advice on how to evaluate Ferguson's statements to police, which contradicted the testimony of his codefendant on the question of [Ferguson's] role in the shootings'").

The prosecutor properly argued his case to the jury, including referencing the evidence presented that contradicted that of the defense.

B.

Morris alleges that the prosecutor improperly told the jury that defense counsel's argument showed that Morris was lying. Specifically, Morris contends that, after defense counsel had argued that whoever committed the murder did not intend to do so, the prosecutor improperly commented that the defense

was alleging contradictory theories: that Morris did not commit the offense and that he committed the offense but did not mean to commit it. Morris argues that this comment suggests that defense counsel's remarks were substantive evidence and was an attempt by the State to lessen its burden of proof.

This argument by the prosecutor, however, was a legitimate comment on Morris's theories of defense. ""Argument by the prosecution concerning omissions and inconsistencies in the defendant's version of the case is not improper."" *Whitt v. State,* 733 So.2d 463, 482 (Ala.Crim.App. 1998), quoting *Mosely v. State,* 628 So.2d 1041, 1042 (Ala.Crim.App. 1993), quoting in turn *Salter v. State,* 578 So.2d 1092, 1096 (Ala.Crim.App. 1990), cert. denied, 578 So.2d 1097 (Ala. 1991). "The prosecutor's argument regarding the defense's theory was a fair and legitimate comment on the evidence and a fair response to the argument of the defense." *Whitt v. State,* 733 So.2d at 483. *See Minor v. State,* 914 So.2d 372 (Ala.Crim.App. 2004) (prosecutor's comments during rebuttal closing argument of guilt phase of capital trial did not impermissibly shift the burden of proof but was a legitimate comment on the lack of evidence to support Minor's theory of defense); *Reeves v. State,* 807 So.2d 18 (Ala.Crim.App. 2000) (prosecutor's comment during rebuttal closing argument at guilt phase did not spotlight defense's strategy and argue that the evidence did not support defense's theory that the robbery was a "'mere afterthought'"). Here, the comment by the prosecutor was an appropriate response to Morris's arguments. *Butler v. State,* 781 So.2d 994, 1004 (Ala.Crim.App. 2000).

C.

Morris argues that the prosecutor improperly told the jury that it was its "oath" to convict Morris. Morris refers to an exhortation made by one of the prosecutors at the close of his guilt-phase argument, arguing to the jury that it was its oath to hold Morris responsible for this brutal murder.

"'Generally, the prosecutor is in error by exhorting the jury to "do what's right," or to "do its job," if that exhortation "impl[ies] that, in order to do so, it can only reach a certain verdict, regardless of its duty to weigh the evidence and follow the court's instructions on the law."' *McNair v. State*, 653 So.2d 320, 339-40 (Ala.Crim.App. 1992), aff'd, 653 So.2d 353 (Ala. 1994), quoting *Arthur v. State*, 575 So.2d 1165, 1185 (Ala.Crim.App. 1990). However, it is not improper for a prosecutor to argue to the jury that a defendant is guilty or to urge the jury to find the defendant guilty of the crime charged so long as that argument is based on the evidence; in fact, that is exactly what a prosecutor is supposed to do during closing argument. See *Galloway v. State*, 484 So.2d 1199 (Ala.Crim.App. 1986), and the authorities cited therein. See also *Broadnax v. State*, 825 So.2d 134, 183 (Ala.Crim.App. 2000), aff'd, 825 So.2d 233 (Ala. 2001), and *Melson v. State*, 775 So.2d 857, 889–90 (Ala.Crim.App. 1999), aff'd, 775 So.2d 904 (Ala. 2000). Moreover, "'the prosecuting attorney may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evi-

dence of the case.'" *Henderson v. State,* 584 So.2d 841, 857 (Ala.Crim.App. 1988), remanded on other grounds, 584 So.2d 862 (Ala. 1991), on remand to, 587 So.2d 1071 (Ala. Crim.App. 1991), remanded on other grounds, 616 So.2d 348 (Ala. 1992), on return to remand, 616 So.2d 352 (Ala. Crim.App. 1993), quoting *Nicks v. State,* 521 So.2d 1018, 1023 (Ala.Crim.App. 1987), aff'd, 521 So.2d 1035 (Ala. 1988). See also *Handley v. State,* 214 Ala. 172, 175, 106 So. 692, 695 (1925) (argument—"'She is a murderer; she is a murderer. She is not some one who has committed some of the lower offenses of homicide"—did not transcend the bounds of legitimate argument'); *Maples v. State,* 758 So.2d 1, 58 (Ala.Crim.App.), aff'd, 758 So.2d 81 (Ala. 1999) (prosecutor's comment that the defendant "'is a murderer; a capital murderer'" was not improper); *Melson,* 775 So.2d at 889 (prosecutor's reference to the defendant as a "'cold-blooded murderer'" with "'no remorse'" was not improper); *Thomas v. State,* 766 So.2d 860, 933–34 (Ala. Crim.App. 1998), aff'd, 766 So.2d 975 (Ala. 2000) (prosecutor's references to defendant as a "'street punk,'" ""criminal,"" "thug," ""murderer,'" and "'manipulator'" were not improper); and *Kinard v. State,* 495 So.2d 705, 711 (Ala.Crim.App. 1986) (prosecutor's reference to defendant as "'an unmitigated liar and murderer'" was not improper). The prosecutor's comments were supported by the evidence in this case and were not improper."

Minor v. State, 914 So.2d 372, 420 (Ala.Crim.App. 2004), (finding no plain error in prosecutor's com-

ment asking the jury "'to find that man guilty of the murder of his son'").

There was no plain error in this comment by the prosecutor.

D.

Morris argues that the prosecutor repeatedly made improper references to him as "'the one liar in this case'" (Morris's brief, at 101), based on his omission of details in his statements to the police. He further argues that in doing so, the prosecutor vouched for the credibility of State's witnesses. Morris fails to cite to the record in support of this argument.

A review of the closing arguments by both of the prosecutors, taking into account their total argument to the jury, reveals that the comments referring to Morris as lying or being a liar or implying deceit on Morris's part, were based on the contradictions in the statements Morris gave to the police, Morris's answers during his testimony suggesting that he did not remember or did not know, and his use of a false identification when he was arrested, as well as the conflicts between his testimony and that of State's witnesses.

This Court addressed this same issue recently in *Johnson v. State*, [Ms. CR-99-1349, October 2, 2009] __ So.3d __ (Ala.Crim.App. 2009), and stated:

"... [A]ny characterization of Johnson as a liar by the prosecutor would have been supported by the

evidence in the present case because of the varying statements given by her to the police. She initially stated that she was in Tuscaloosa, Alabama, at the time of the murder, but eventually admitted that the first statement was untrue and cast the blame on Richards; she eventually admitted having been involved in the murder. Similarly, in *Smith v. State,* 795 So.2d 788 (Ala.Crim.App. 2000), Smith argued that the prosecutor improperly referred to him as a liar. This Court stated:

> "'Clearly, this characterization of the appellant is supported by the record. Smith, in his first statement, totally denied any involvement in the robbery-murder. In the second statement he admitted his participation in the robber-murder. "[T]he prosecutor, in the appropriate case, may use opprobrious terms to characterize the accused or his conduct, provided that the remarks are in accord with the evidence." *Bankhead* [*v. State,* 585 So.2d 97, 105 (Ala.Crim.App. 1989), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 132 L.Ed.2d 680 (1997)].'

"795 So.2d at 825.

"Further, there is no indication in the record that the prosecutor improperly vouched for the credibility of the State's witnesses.

> "'"A distinction must be made between an argument by the prosecutor personally vouching for a witness, thereby bolstering the credibility of the witness, and an argument concerning the credi-

bility of a witness based upon the testimony presented at trial. '[P]rosecutors must avoid making personal guarantees as to the credibility of the state's witnesses.' *Ex parte Parker*, 610 So.2d 1181 (Ala. 1992). See *Ex parte Waldrop*, 459 So.2d 959, 961 (Ala. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985).

"'"'"'Attempts to bolster a witness by vouching for his credibility are normally improper and error." ... The test for improper vouching is whether the jury could reasonably believe that the prosecutor was indicating a personal belief in the witness' credibility.... This test may be satisfied in two ways. First, the prosecution may place the prestige of the government behind the witness, by making explicit personal assurances of the witness' veracity.... Secondly, a prosecutor may implicitly vouch for the witness' veracity by indicating that information not presented to the jury supports the testimony.'

"'"'*United States v. Sims*, 719 F.2d 375, 377 (11th Cir.1983), cert. denied, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984)."

"'*DeBruce v. State*, 651 So.2d 599, 610–11 (Ala.Crim.App. 1993), aff'd, 651 So.2d 624 (Ala. 1994).'

"*Brown v. State*, 11 So.3d 866, 910–11 (Ala.Crim.App. 2007), affirmed, *Ex parte Brown*, 11 So.3d 933 (Ala. 2008), cert. denied, *Brown v. Ala-*

bama, __ U.S. __, 129 S.Ct. 2864, 174 L.Ed.2d 582 (2009).

"Here, there is no indication in the record that the prosecutor impermissibly vouched for any witness's credibility as he never suggested that there was evidence undisclosed to the jury that would support a witness's testimony nor did he ever make personal assurances of a witness's veracity. Thus, there is no error on this ground."

__ So.3d at __.

The prosecutors' references to Morris as being a liar were based on the evidence and were thus a proper argument to the jury. Moreover, the prosecutors did not vouch for the credibility of any witnesses in doing so.

X.

Morris argues that his conviction is due to be overturned because, he says, the State failed to establish the reliability of the methodology for its DNA testing. Morris also argues that the State improperly failed to retain samples of DNA for testing by the defense. Morris failed to object at trial as to the methodology of the State's DNA testing. Moreover, although the defense implied error in the State's failure to retain a sample of the cigarette butt when cross-examining the State's expert, Morris never objected on this ground.

Morris contends that the trial court erred by failing to conduct an evidentiary hearing outside the jury's presence as to the reliability of the State's DNA testing. However, Morris never requested such a hearing or objected to its omission.

> "In the present case, because the admission of the DNA evidence was not contested or challenged before or during trial, the trial court did not hold a hearing outside the presence of the jury. In *Payne v. State,* 683 So.2d 440, 455 (Ala.Cr.App. 1995), aff'd, 683 So.2d 458 (Ala. 1996), cert. denied, 520 U.S. 1146, 117 S.Ct. 1319, 137 L.Ed.2d 481 (1997), we held that a trial court did not commit reversible error by not holding a hearing outside the presence of the jury to determine the admissibility of the DNA evidence. In *Payne,* we concluded that if a defendant wanted to allege that the trial court erred in not conducting a hearing outside the jury's presence to determine the admissibility of the DNA evidence, it was incumbent upon the defendant to have first requested that such a hearing be conducted. Accordingly, because Simmons did not request a hearing, no reversible error occurred in this regard in the trial court's admission of the DNA evidence."

Simmons v. State, 797 So.2d 1134, 1145 (Ala.Crim.App. 1999).

Moreover, in arguing that the State erred by failing to identify the method used to test the DNA and thereby to verify its reliability, Morris acknowledged that this Court has held counter to his argument in

Broadnax v. State, 825 So.2d 134, 174 (Ala.Crim.App. 2000), by finding that the State's failure to name the particular method of DNA analysis did not result in unreliable evidence. Rather, this Court held that "[t]he failure of testimony to name the DNA method used goes to the weight of the evidence, not its admissibility." *Id.*

> ""'Whether otherwise reliable testing procedures were performed without error in a particular case goes to the weight of the evidence, not its admissibility. Only if a party challenges the performance of a reliable and relevant technique and shows that the performance was so particularly and critically deficient that it undermined the reliability of the technique, will evidence that is otherwise reliable and relevant be deemed inadmissible.'""

Broadnax v. State, 825 So.2d at 173–74, quoting *Simmons v. State*, 797 So.2d at 1144–45, quoting in turn, *Turner v. State*, 746 So.2d 355, 360–61 (Ala. 1998).

Here, the methodology of the DNA testing was a matter concerning the weight to be accorded that evidence and there is no indication in the record or showing made by Morris that the testing was unreliable. Thus, to so conclude would be to yield to speculation.

As to Morris's argument that the State's failure to demonstrate the reliability of the DNA testing was compounded by the destruction of the cigarette butt

during the pretrial testing, the record shows otherwise. On cross-examination, the State's expert was asked about the destruction of the cigarette butt and the resulting inability of an independent test by a secondary expert. The expert testified that "[t]here's DNA extract remaining, the liquid that-after the liquid dissolves the filter and sponge material, what's left is called the DNA extract. And there's a portion of that that we always retain for future testing if that's required, so that is left, yes." (R. 420.)

Thus, Morris suffered no prejudice-he could have tested the DNA using his own expert. *See Holdren v. Legursky,* 16 F.3d 57, 60 (4th Cir. 1994), cert. denied, 513 U.S. 831, 115 S.Ct. 106, 130 L.Ed.2d 53 (1994) (any failure by treating physician to collect samples from rape victim for subsequent testing went to the weight of the evidence rather than its admissibility). Cf. *Ex parte Gingo,* 605 So.2d 1237 (Ala. 1992) (destruction of samples allowed evidence of test results only against Gingo and he was denied access to any potentially exculpatory material).

XI.

Morris argues that the trial court improperly restricted defense counsel from questioning police officers about the failure to investigate evidence suggesting that someone else had committed the murder. Specifically, Morris alleges that he was not allowed to question a State's witness about whether his investigation revealed that a suspicious blue van with several black males was seen in the vicinity of

Rochester's house around the time of Rochester's death.

The record contains the State's renewal of its motion in limine and a second motion in limine, requesting the trial court to bar Morris from referring to a "'blue car with several black males in it located in the alley.'" These motions, however, are dated as filed on March 19, 2007, and July 17, 2007, respectively, indicating that they were filed before Morris's second trial, which ended in a mistrial. In the second motion in limine, the State argues that during the first trial, defense counsel questioned the State's witness about his investigation of the alleged vehicle. The court held that the questioning called for inadmissible hearsay; therefore before the second trial the State requested that Morris be barred from a similar line of questioning.

In the third trial, just prior to voir dire, the following transpired:

"[Prosecutor]: Well, Judge, you know, I forget what all we did the last time but we just want to renew our motions in limine that no questions involving hearsay of—well, canvassing the neighborhood. I think they tried to ask the detective that. If the witnesses are available, that's fine but we don't-we would object to hearsay questions so we have a motion in limine about that. I believe you granted that last time.

"[Defense counsel]: That was about the blue car deal.

"[Prosecutor]: Right, that's right.

"THE COURT: About the what?

"[Prosecutor]: There was a suspicious blue car in the alley or neighborhood or something. Who knows who said that.

"THE COURT: Well, to the extent it involves hearsay, I grant the motion in limine. You know, I kind of have to wait and see what happens, you know, as we progress and see how the question is asked because it's difficult to do till I hear the questions."

(R. 9–10.)

No further discussion was had on this subject, and Morris did not attempt to question the State's witness as to any investigation concerning this alleged vehicle. Morris may not assert as error a bar to questioning a witness when he never sought to question the witness as to the information he now claims was relevant. The trial court stated that it could not rule on the questions until they were posed and only held that it would not allow inadmissible hearsay into evidence. It appears from the record that Morris was satisfied with, or acquiesced to, the trial court's ruling. *J.E. v. State*, 997 So.2d 335, 340-41 (Ala.Crim.App. 2007) ("J.E. cannot predicate error on the violation in the present case because he acquiesced in the determination that the error was cured and that further correction was not required.").

There is no error on this ground.

XII.

Morris argues that the trial court failed to properly instruct the jury on the reasonable-doubt standard. He raises this challenge for the first time on appeal; therefore, this instruction is due to be evaluated under the plain-error rule. Rule 45A, Ala.R.App.P.

Morris specifically takes issue with certain terminology used by the trial court to describe reasonable doubt. He cites to the following language by the trial court: "[A]nd the law means a sound and sensible reason as opposed to some imaginary or fanciful reason"; "[I]t's not a probability or mere suspicion, it's not a mere possible doubt because everything relating to human affairs is open to some possible doubt"; "[I]t does not mean a vague or arbitrary notion"; "[I]t's distinguished from a doubt arising from mere possibility, from bare imagination or from fanciful conjecture." (R. 526.) Morris also argues as improper the trial court's instruction to the jury that "to convict an innocent person or to acquit a guilty person damages the entire criminal justice system." As to this last instruction, Morris contends that it improperly suggests that a wrongful conviction is no more harmful that a wrongful acquittal, although the reasonable-doubt standard stands for the principle that "'it is better that a hundred guilty men go free than one innocent man suffer an unjust conviction.'"

(Morris's brief, at 107, quoting *Pruitt v. State*, 270 P.2d 351, 362 (Okla.Crim.App. 1954).)

> """In setting out the standard for plain error review of jury instructions, the court in *United States v. Chandler*, 996 F.2d 1073, 1085, 1097 (11th Cir. 1993), cited *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), for the proposition that "an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner." *Williams v. State*, 710 So.2d 1276, 1306 (Ala.Cr.App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998)."'
>
> "'*Broadnax v. State*, 825 So.2d 134, 196 (Ala.Crim.App.2000), quoting *Pilley v. State*, 789 So.2d 870, 882–83 (Ala.Crim.App. 1998). Moreover, "[w]hen reviewing a trial court's jury instructions, we must view them as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them. *Ingram v. State*, 779 So.2d 1225 (Ala.Cr.App. 1999)." *Johnson v. State*, 820 So.2d 842, 874 (Ala.Crim.App. 2000).'
>
> "*Snyder v. State*, 893 So.2d 488, 548 (Ala.Crim.App. 2003)."

Belisle v. State, 11 So.3d 256, 308 (Ala.Crim.App. 2007), affirmed, 11 So.3d 323 (Ala. 2008), cert. denied, __ U.S. __, 129 S.Ct. 2865, 174 L.Ed.2d 582 (2009.)

A review of the entire reasonable-doubt instruction given by the trial court in the present case reveals that it properly followed the legal guidelines and the Alabama Pattern Jury Instructions in instructing the jury. The trial court charged the jury as follows:

"Now, ladies and gentlemen, the burden of proof in this case is on the State of Alabama as it is in any criminal case. And you say, well, what does that mean. Well, it's almost a self-defining term. It means a doubt that you can give a reason for. And the law means a sound and sensible reason as opposed to some imaginary or fanciful reason. Sometimes efforts to define beyond a reasonable doubt don't always clarify it. It's not a probability or a mere suspicion, it's not a mere possible doubt because everything relating to human affairs is open to some possible doubt.

"A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all of the evidence. It's a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but it's an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence, or a combination of all of those factors. It's a doubt that remains in your minds after going over the entire case and giving consideration to all of the testimony and evidence and it's distinguished from a doubt arising from mere possibility, from bare imagination or from fanciful conjecture.

"If after considering all the evidence you're convinced of the defendant's guilt beyond a reasonable doubt, it would be your duty to convict the defendant and you should say so. However, after considering all the evidence in the case you have a reasonable doubt of the defendant's guilt, then you should acquit him and say so in that regard as well."

(R. 525–26.)

None of the language found objectionable in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339, was used by the trial court in his reasonable-doubt charge.[9] The instruction neither lowered the standard of proof nor was it confusing or deficient.

"The instruction on reasonable doubt that the trial court provided to the jury here incorporated the language found in the Alabama Pattern Jury Instructions on reasonable doubt. The pattern jury instructions inform jurors that their doubt cannot be based on 'a mere guess or surmise' but must be based on 'reason and common sense.' It also informs jurors that reasonable doubt that 'entitles an accused to an acquittal is not a mere fanciful,

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[9] We note that the trial court did use the terminology "mathematical certainty or beyond all doubt" in its circumstantial-evidence charge. (R. 533.) However, there was no error in that usage. *Sharifi v. State*, 993 So.2d 907, 933–34 (Ala.Crim.App. 2008), cert. denied, __ U.S. __, 129 S.Ct. 491, 172 L.Ed.2d 386 (2008.).

vague, conjectural or speculative doubt.' *Alabama Pattern Jury Instructions:* Criminal, Instructions 1.4 and 1.5 (3d ed.1994). ""A trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error.'" *Wilson v. State,* 777 So.2d 856 (Ala.Crim.App. 1999), quoting *Price v. State,* 725 So.2d 1003, 1058 (Ala.Crim.App. 1997), aff'd, 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999).' *Snyder v. State,* 893 So.2d 488, 550 (Ala.Crim.App.2003)."

Harris v. State, 2 So.3d 880, 913 (Ala.Crim.App. 2007).

Moreover, the trial court did not imply that it is preferable to convict an innocent man than to free a guilty one; rather, it instructed as to the wrongfulness of both. *See generally Jackson v. State,* 432 So.2d 504, 508 (1983) (holding, without commenting on the charge, that the trial court did not err in failing to charge the jury that "it is better that many guilty people go unpunished than that one innocent person is convicted" because it was an abstract principle of law).

There was no error, plain or otherwise, in the trial court's instructions to the jury as to the reasonable-doubt standard.

XIII.

Morris alleges that the State improperly introduced victim-impact evidence during the guilt phase

of his trial. Morris refers to evidence that Rochester had a son who was deaf, that she listened to "church" music, and that she had a granddaughter who died of Hodgkin's disease, that she owned religious jewelry, and that she had a Bible that was "torn up" during the offense. He argues that this evidence unduly inflamed the jury. Morris failed to object to any of this testimony at trial; therefore, this issue is due to be analyzed under the plain-error rule. Rule 45A, Ala.R.App.P.

A review of the record reveals that this testimony had no prejudicial impact on Morris's trial.

> "In *Ex parte Rieber*, 663 So.2d 999, 1006 (Ala. 1995), this Court held:
>
> > "'It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that [the defendant] did not receive a fair trial simply because the jurors were told what they probably had already suspected-that [the victim] was not a "human island," but a unique individual whose murder had inevitably had a profound impact on her children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in *Payne v. Tennessee*, 501 U.S. 808, 838, 111 S.Ct. 2597, 2615, 115 L.Ed.2d 720 (1991))."'

Ex parte Walker, 972 So.2d 737, 747 (Ala. 2007) (holding no reversible error from introduction of

guilt-phase evidence concerning family history, community activity, and character of 87-year-old victim, as well as testimony from a daughter and a friend).

After carefully examining the record, we conclude that the admission of the complained-of testimony did not constitute reversible error.

XIV.

Morris argues that, during the prosecutor's questioning of a police officer at trial, the prosecutor improperly commented on Morris's silence following the appointment of defense counsel. Morris raises this issue for the first time on appeal, and thus this issue is to be analyzed under the plain-error rule. Rule 45A, Ala.R.App.P.

However, the testimony to which Morris alludes could not reasonably have been construed to constitute a comment on his failure to testify. During the direct examination of the officer who had taken Morris's statement following his arrest and who had interviewed him again later, the prosecutor elicited testimony recounting a number of inconsistencies, deceitful responses, and alterations in the statements given by Morris. The following transpired during this direct examination:

"Q. You talked to him about the jewelry he had on him when he was arrested?

"A. Yes, sir, we did.

"Q. How did he explain how he came to be in possession of that?

"A. Said he won it in a crap game shooting dice.

"Q. Did he tell you any other explanation for it?

"A. He said he had paid ten dollars to a guy for this stuff too. When it all started we asked him where he lived and who he lived with and then he said he paid ten dollars for the stuff, and then later on in the interview he said he won it in a crap game.

"Q. Did he tell you the name of the person he won it from?

"A. No, sir, he did not.

"Q. Did y'all ask him who?

"A. Yes, sir.

"Q. Did he tell you he didn't know?

"A. Yes, sir.

"Q. Did y'all ask him about names for any of the people that he got in a fight with?

"A. Yes, sir.

"Q. Did he tell you who they were?

"A. By name, no, sir.

"Q. Did he tell you who he was rolling dice with?

"A. By name, no, sir.

"Q. Did y'all talk to him about his time frame for when he was at certain places the night before?

"A. Yes, sir.

"Q. Was he able to give you some accurate or specific times?

"A. Nothing was specific time-wise.

"Q. Could he tell you what time he left his house?

"A. Specific time, no, not by time, no.

"Q. Did he tell you what time he ate at the Huddle House?

"A. No, sir. A specific time, no, sir.

"Q. Did he give you ages of the guys who he got in a fight with?

"A. Yes, sir.

"Q. Do you recall what ages those were?

"A. Eighteen to twenty years old.

"Q. Did he tell you anything about being taken back to the crime scene?

"A. No, sir.

"Q. Did he tell you anything about seeing crime scene tape?

"A. No, sir.

"Q. Where did he tell you he thought he was taken after he was arrested?

"A. I think he said he went to the fire station, yeah, I think that's right, and then to Cooper Green.

"Q. Did he tell you that he was with Ron Smith?

"A. No, sir.

"Q. At any point?

"A. No, Sir.

"Q. And when was the first time you heard the names Ron Smith or Cue Ball or John Lewis in relation to this case?

"A. About a month ago."

(R. 470–72.)

Taken in context, the question by the prosecutor was to elicit testimony indicating that Morris had

recently formulated a story as part of his defense. The jury would not have understood this question to refer to Morris's silence following the appointment of defense counsel.

As this Court stated in *Connell v. State*, 7 So.3d 1068 (Ala.Crim.App. 2008):

> "We have reviewed the complained-of comment in light of the entire trial, including the defense's opening argument and the prosecutor's closing argument. Viewed in that context, the prosecutor was obviously commenting on the appellant's previous inconsistent statements and on the fact that the evidence did not support the representations defense counsel made in his opening argument. Moreover, the prosecutor's comment was not '"of such character that a jury would naturally and necessarily construe it as a comment on the defendant's silence."' *Ex parte Davis*, 718 So.2d at 1173. Therefore, the appellant's argument is without merit."

7 So.3d at 1096. *See Barber v. State*, 952 So.2d 393, 440 (Ala.Crim.App. 2005) (prosecutor's comment would not have been construed by the jury as a comment on Barber's silence, but rather was "a permissible comment on the evidence and reply-in-kind to the defense's implications").

XV.

Morris argues that his conviction should be overturned because, he says, the trial court improperly

admitted gruesome and unduly prejudicial photographs of the victim into evidence. Morris refers to pages in the transcript containing the admission of photographs depicting the victim's wounds and the crime scene. When the trial court asked if there were any objections to the admission of these photographs, defense counsel responded that he had no objection. Therefore, this issue must be analyzed under the plain-error rule. Rule 45A, Ala.R.App.P.

> "'"Generally, photographs are admissible into evidence in a criminal prosecution 'if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge.'" *Bankhead v. State,* 585 So.2d 97, 109 (Ala.Crim.App. 1989), remanded on other grounds, 585 So.2d 112 (Ala. 1991), aff'd on return to remand, 625 So.2d 1141 (Ala.Crim.App. 1992), rev'd, 625 So.2d 1146 (Ala. 1993), quoting *Magwood v. State,* 494 So.2d 124, 141 (Ala.Crim.App. 1985), aff'd, 494 So.2d 154 (Ala. 1986). "Photographic exhibits are admissible even though they may be cumulative, demonstrative of undisputed facts, or gruesome." *Williams v. State,* 506 So.2d 368, 371 (Ala.Crim.App. 1986) (citations omitted). In addition, "photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors." *Ex parte Siebert,* 555 So.2d 780, 784 (Ala. 1989). "This court has held that autopsy photographs, although gruesome, are admissible to show the

extent of a victim's injuries." *Ferguson v. State,* 814 So.2d 925, 944 (Ala.Crim.App. 2000), aff'd, 814 So.2d 970 (Ala. 2001). "'[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter.'" *Jackson v. State,* 791 So.2d 979, 1016 (Ala.Crim.App. 2000), quoting *Perkins v. State,* 808 So.2d 1041, 1108 (Ala.Crim.App. 1999), aff'd, 808 So.2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002), on remand to, 851 So.2d 453 (Ala. 2002). "The same rule applies for videotapes as for photographs: 'The fact that a photograph is gruesome and ghastly is no reason for excluding it, if relevant, even if the photograph may tend to inflame the jury.'" *Siebert v. State,* 562 So.2d 586, 599 (Ala.Crim.App. 1989), aff'd, 562 So.2d 600 (Ala. 1990), quoting *Walker v. State,* 416 So.2d 1083, 1090 (Ala.Crim.App. 1982). See also *Ward v. State,* 814 So.2d 899 (Ala.Crim.App. 2000). Generally, "[a] properly authenticated video tape recording of the scene of the crime constitutes competent evidence" and "is admissible over the defendant's objections that the tape was inflammatory, prejudicial, and cumulative." *Kuenzel v. State,* 577 So.2d 474, 512–13 (Ala.Crim.App. 1990), aff'd, 577 So.2d 531 (Ala.1991). "Provided that a proper foundation is laid, the admissibility of videotape evidence in a criminal trial is a matter within the sound discretion of the trial judge." *Donahoo v. State,* 505 So.2d 1067, 1071 (Ala.Crim.App. 1986).'

"973 So.2d at 393.

> "Here, the crime scene video was properly authenticated and constituted competent evidence. Despite the gruesome appearance of the crime scene and the victim's body, the video and photographs of the body and crime scene were properly admitted within the trial court's discretion."

Johnson v. State, [Ms. CR-99-1349, October 2, 2009] __ So.3d __, (Ala.Crim.App. 2009).

In the present case, after viewing the photographs and noting that they were properly authenticated by the witness, we find that they were competent evidence and properly admitted within the trial court's discretion. There was no plain error as to the admission of the photograph.

XVI.

Morris contends that the trial court deprived him of his constitutional right to ask jurors about their racial bias. Specifically, Morris argues that, because he is a black man and the victim was a white woman, he should have been allowed to submit a written questionnaire to the prospective jurors to ascertain whether they had any racial bias. He argues that the trial court's decision to prevent him from doing so violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution.

In the present case, the record indicates that there was a thorough voir dire examination of the venire, including group and individual questioning. The trial court did not limit the questioning. Moreover, Morris raises no specific claim or indication of prejudice by a juror who sat on his jury or another member of the venire.

"'In *Ex parte Land,* 678 So.2d 224 (Ala. 1996), the Alabama Supreme Court held that the method of voir dire examination is within the discretion of the trial court and a trial court's refusal to allow the use of [a] juror questionnaire is not an abuse of that discretion.' *Hodges v. State,* 856 So.2d 875, 913 (Ala.Crim.App. 2001), aff'd, 856 So.2d 936 (Ala.2003)." *Sneed v. State,* 1 So.3d 104, 135 (Ala.Crim.App. 2007), cert. denied, 1 So.3d 104 (Ala. 2008), cert. denied, __ U.S. __, 129 S.Ct. 1039, 173 L.Ed.2d 472 (2009.)

Similarly, in *Brown v. State,* 11 So.3d 866, 885 (Ala.Crim.App. 2007), Brown argued "that the circuit court erred in denying his motion to have the prospective jurors complete juror questionnaires related to their qualifications for jury service. [Brown] assert[ed] that voir dire [was] inadequate to uncover prejudices; therefore, he argue[d], it was essential that the jurors complete questionnaires." In holding that the trial court did not abuse its "broad discretion" by denying Brown's request for juror questionnaires, this Court noted that Brown pointed to no specific instance where the voir dire had been inadequate to show any prejudices. *Id.*

In the present case, the trial court did not abuse its discretion in denying Morris's motion, and there was no indication of any racial prejudice by the potential jurors.

XVII.

Morris contends that his right to an impartial jury was violated by the striking of two prospective jurors who were opposed to the death penalty.[10]

The record indicates that during the voir dire examination of the venire, the trial court asked if anyone had a fixed opinion either in favor of or in opposition to the death penalty. (R. 21–23.) The two potential jurors whose removal Morris now challenges, indicated that they held such a fixed opinion were subsequently questioned individually. The trial court and defense counsel questioned the first potential juror, who unequivocally stated that he would never consider the death penalty. The prosecutor moved that the juror be removed for cause, and the trial court granted the motion. Morris did not object. The second potential juror also stated that he would not consider the death penalty under any circumstances. Morris again did not object to the trial

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[10] We note that the record indicates that a third potential juror indicated that she had strong feelings about the death penalty but that she was not further questioned as to her beliefs. However, the record shows that neither party had to exercise a strike to remove this potential juror, and she did not serve on the jury.

court's granting of the prosecutor's motion to strike the potential juror for cause. Rule 45A, Ala.R.App.P.

According to § 12-16-152, Ala.Code 1975:

> "On the trial for any offense which may be punished capitally or by imprisonment in the penitentiary, it is a good cause of challenge by the state that the person would refuse to impose the death penalty regardless of the evidence produced or has a fixed opinion against penitentiary punishment or thinks that a conviction should not be had on circumstantial evidence, which cause of challenge may be proved by the oath of the person or by other evidence."

See Rule 18.4(e), Ala.R.Crim.P. ("When a prospective juror is subject to challenge for cause or it reasonably appears that the prospective juror cannot or will not render a fair and impartial verdict, the court, on its own initiative or on motion of any party, shall excuse that juror from service in the case").

> "Also, '"[t]he trial judge is in the best position to hear a prospective juror and to observe his or her demeanor."' *McNair v. State,* 653 So.2d 320, 324 (Ala.Crim.App. 1992), aff'd, 653 So.2d 353 (Ala. 1994) (quoting *Ex parte Dinkins,* 567 So.2d 1313, 1314 (Ala. 1990)). Finally,
>
> > '"[t]he test for determining whether a strike rises to the level of a challenge for cause is "whether a juror can set aside their opinions and try the case fairly and impartially, according to the law and

> the evidence." *Marshall v. State,* 598 So.2d 14, 16 (Ala.Cr.App. 1991). "Broad discretion is vested with the trial court in determining whether or not to sustain challenges for cause." *Ex parte Nettles,* 435 So.2d 151, 153 (Ala. 1983). "The decision of the trial court 'on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion.'" *Nettles,* 435 So.2d at 153. In *Marshall v. State,* 598 So.2d 14 (Ala.Cr.App. 1991), this court held that it was not error for a trial court to deny challenges for cause of two jurors who stated that they knew the victim or her family. One veniremember had been employed as a maid by the victim's family and the other stated that she knew the victim's family. *Marshall,* 598 So.2d at 16. This court held that this relationship was not grounds for a challenge for cause as long as the juror indicates that he or she can be fair and impartial. 598 So.2d at 16.'
>
> "*Dunning v. State,* 659 So.2d 995, 997 (Ala.Crim.App. 1994)."

Killinqsworth v. State, [Ms. CR-06-0854, November 13, 2009] __ So.3d __, __ (Ala.Crim.App. 2009).

The trial court, which is able to view the potential juror's demeanor as he or she answers the questions posed on voir dire and subsequently if necessary, is in a better position to evaluate his or her beliefs or convictions. In the instant case, these potential jurors' responses show that their opposition to the death penalty was unwavering and thus would

have prevented them from carrying out their duties as fair jurors. There was no error here.

XVIII.

Morris argues that Alabama's "capital-sentencing statute fails to narrow the universe of defendants eligible for the death penalty." (Morris's brief, at 112.) Specifically, he contends that the death penalty is arbitrarily imposed because Alabama allows the factor making certain offenses capital to also serve as an aggravating circumstance in the case. He also again argues that he is being punished twice for the same offense by being convicted of capital murder because it occurred during both a robbery and a burglary. Morris raises these claims for the first time on appeal; therefore, this issue is due to evaluated under the plain-error rule. Rule 45A, Ala.R.App.P.

Morris's claim concerning the "double-counting" of the aggravating circumstance has consistently been upheld by Alabama appellate courts:

> """[W]hen a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.' Ala.Code 1975, § 13A-5-45(e); see also Ala.Code 1975, § 13A-5-50 ('The fact that a particular capital offense as defined in Section 13A-5-40(a) necessarily includes one or more aggravating circum-

> stances as specified in Section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.'). This is known as 'double-counting' or 'overlap,' and Alabama courts 'have repeatedly upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense.' *Ex parte Trawick,* 698 So.2d 162, 178 (Ala. 1997); see also *Coral v. State,* 628 So.2d 954, 965 (Ala.Crim.App. 1992).'"'"

Billups v. State, [Ms. CR-05-1767, November 13, 2009] __ So.3d __, __ (Ala.Crim.App. 2009), quoting *Barber v. State,* 952 So.2d 393, 458–59 (Ala.Crim.App. 2005). *See also Newton v. State,* [Ms. CR-05-1517, October 2, 2009] __ So.3d __, __ (Ala.Crim.App. 2009).

This precise ground of error, that this double-counting fails to narrow the class of death-eligible murderers, has been addressed and determined adversely to Morris by the United States Supreme Court:

> "Here, the 'narrowing function' was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that 'the offender has a specific intent to kill or to inflict great bodily harm upon more than one person' The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact

> that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more."

Lowenfield v. Phelps, 484 U.S. 231, 246, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

Thus, as this issue has previously been discussed and determined adversely to Morris's contention, there is no error on this ground.

Furthermore, Morris's argument that he was improperly convicted of and sentenced based on both murder during a robbery and murder during a burglary is without merit here. See Part II.B. of this opinion. The evidence supported the jury's finding that Morris broke into Rochester's home with the intention of committing a theft inside and murdered her in the course of doing so. He also murdered Rochester while overcoming her physical resistence and causing serious physical injury in order to commit the theft.

Despite Morris's contention that he could not be convicted and sentenced to both of these capital offenses for the same murder, this argument has also been previously decided adversely to Morris. As this Court stated in *Belisle v. State,* 11 So.3d 256 (Ala.Crim.App. 2007), affirmed, 11 So.3d 323

(Ala.2008), cert. denied, __ U.S. __, 129 S.Ct. 2865, 174 L.Ed.2d 582 (2009):

"Belisle was charged and convicted for two counts of capital murder for murdering Joyce Moore during the course of a burglary and a robbery, violations of §§ 13A-5-40 (a)(2) and (a)(4), Ala.Code 1975. Both require proof of different elements-one a burglary and one a robbery-and do not offend the Double Jeopardy Clause. 'A defendant can be convicted of two or more capital murders for the death of one victim, so long as those convictions are in accordance with *Blockburger* [*v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)], i.e., so long as each conviction required an element not required in the other convictions.' *Heard v. State,* 999 So.2d 992, 1009 (Ala. 2007). See also *Ex parte Haney,* 603 So.2d 412, 419 (Ala. 1992); *Ex parte Peraita,* 897 So.2d 1227 (Ala. 2004); *Ex parte McWilliams,* 640 So.2d 1015 (Ala. 1993); *Castillo v. State,* 925 So.2d 284 (Ala.Crim.App. 2005); *Flowers v. State,* 922 So.2d 938 (Ala.Crim.App. 2005); *White v. State,* 900 So.2d 1249 (Ala.Crim.App. 2004); *Wynn v. State,* 804 So.2d 1122 (Ala.Crim.App. 2000); *Barksdale v. State,* 788 So.2d 898 (Ala.Crim.App. 2000); *Freeman v. State,* 776 So.2d 160 (Ala.Crim.App. 1999); *Burtram v. State,* 733 So.2d 921 (Ala.Crim.App. 1998); *Hyde v. State,* 778 So.2d 199 (Ala.Crim.App. 1998); *Madison v. State,* 718 So.2d 90 (Ala.Crim.App. 1997); *Merriweather v. State,* 629 So.2d 77 (Ala.Crim.App. 1993).

"Belisle's convictions for two counts of capital murder for murdering Moore during the course of a

burglary and a robbery do not violate the Double Jeopardy Clause."

11 So.3d at 280. *See also Lewis v. State,* [Ms. CR-06-1770, October 2, 2009] __ So.3d __, __ (Ala.Crim.App. 2009).

Because Morris could properly be convicted of both of these capital offenses violating double-jeopardy principles, and because the evidence supported the jury's determination of guilt as to these two offenses, Morris's claim is without merit.

XIX.

Morris argues that the trial court erred in allowing a key State's witness, Detective Russell, to be present during trial. He submits that because the defense had invoked the general exclusionary rule for witnesses, Detective Russell should not have been allowed to remain in the courtroom.

This issue must be analyzed under the plain-error rule because Morris failed to object to Detective Russell's presence at trial. *Centobie v. State,* 861 So.2d 1111, 1130 (Ala.Crim.App. 2001), cert. denied, 861 So.2d 1145 (Ala. 2003) ("Because the appellant failed to object at trial to the presence of either [the victim's wife or the Alabama Bureau of Investigation investigator], but merely questioned their presence and whether Rule 615, Ala.R.Evid., had been invoked, this argument is subject to review pursuant to the plain-error rule. See Rule 45A, Ala.R.App.P.").

"Rule 9.3, Ala.R.Crim.P., states:

"'(a) Witnesses. Prior to or during any proceeding, the court, on its own motion or at the request of any party, may exclude witnesses from the courtroom and direct them not to communicate with each other, or with anyone other than the attorneys in the case, concerning any testimony until all witnesses have been released by the court.'

"The Committee Comments to this rule establish that 'The power to exclude and separate witnesses is entirely a matter of discretion with the trial court. *Teague v. State,* 245 Ala. 339, 16 So.2d 877 (1944); *Beddow v. State,* 39 Ala.App. 29, 96 So.2d 175 (1956), cert. denied, 266 Ala. 694, 96 So.2d 178 (1957), cert. denied, 355 U.S. 390, 78 S.Ct. 412, 2 L.Ed.2d 414 (1958). By invoking the rule, the court is not compelled to exclude all witnesses but may be selective as appropriate.'

"Further, Rule 615, Ala.R.Evid., states:

"'At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of a criminal offense or the representative of a vic-

> tim who is unable to attend, when the representative has been selected by the victim, the victim's guardian, or the victim's family.'
>
> "The Comments to this rule explain that two of the categories which do not authorize exclusion are 'a party that is not a natural person is entitled to have a representative present. This person is to be an officer or employee of the party and is to be designated by the party's attorney. Allowing such a witness to be present is consistent with historic Alabama practice. An example of this would be when a police officer, who has been in charge of the state's investigation, is allowed to remain in the courtroom despite the fact that the officer will be a witness. See, e.g., *Portomene v. United States*, 221 F.2d 582 (5th Cir. 1955).'"

Johnson v. State, [Ms. CR-99-1349, October 2, 2009] __ So.3d __, __ (Ala.Crim.App. 2009).

The record establishes that Detective Russell was the chief investigator or "on-call homicide detective" in this case (R. 348–49), and, as such, he was the "official 'law enforcement representative'" and allowed to remain in the courtroom by Rule 615, Ala.R.Evid. *Centobie v. State*, 861 So.2d at 1130. The trial court did not abuse its discretion in allowing Detective Russell to remain in the courtroom despite the fact that Detective Russell testified at trial. "In *Ex parte Lawhorn*, 581 So.2d 1179, 1181 (Ala. 1991), the Alabama Supreme Court stated that 'Alabama appellate courts have time and again refused to hold it an abuse of discretion on the part of the trial court

to allow a sheriff, police chief, or similarly situated person who will later testify to remain in the courtroom during trial.' See also *Jackson v. State*, 502 So.2d 858 (Ala.Crim.App. 1986); *Johnson v. State*, 479 So.2d 1377 (Ala.Crim.App. 1985); *Chesson v. State*, 435 So.2d 177 (Ala.Crim.App. 1983), and authorities cited in those cases." *Id.*

Here, the trial court did not abuse its discretion by allowing Detective Russell to remain in the courtroom during the trial. There was no plain error as to this claim.

XX.

Morris argues that Alabama's method of execution is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution, as well as under the Alabama Constitution of 1901, Art. I, § 15. Specifically, Morris contends that the method of lethal injection used in Alabama could result in excessive and undue pain, because "'[i]t is undisputed that, without proper anaesthesia, the administration of pancuronium bromide and potassium chloride, either separately or in combination, would result in a terrifying, excruciating death. The basic mechanics are that the inmate would first be paralyzed and suffocated (because the paralysis would make him unable to draw breath), then feel a burning pain throughout his body, and then suffer a heart attack while remaining unable to breathe." *Ex parte Belisle*, 11 So.3d 323, 338 n. 15 (Ala. 2008), cert. denied, __ U.S. __, 129 S.Ct. 2865, 174 L.Ed.2d

582 (2009), quoting *Harbison v. Little*, 511 F.Supp.2d 872, 883 (M.D.Tenn. 2007).

However, in *Ex parte Belisle*, 11 So.3d at 338, the Alabama Supreme Court held that, in light of the safeguards included in the administration of the drugs used for executions by lethal injection in Alabama, these procedures do not constitute cruel and unusual punishment.

> "We note that Alabama's statutory death-penalty scheme has repeatedly been upheld against constitutional challenges. A comprehensive listing of the cases dealing with these challenges can be found in *Travis v. State*, 776 So.2d 819, 873 (Ala.Crim.App. 1997), aff'd, 776 So.2d 874 (Ala. 2000), cert. denied, 531 U.S. 1081, 121 S.Ct. 785, 148 L.Ed.2d 681 (2001). Moreover, we know of no authority in support of the general proposition that death by lethal injection violates a defendant's constitutional rights. Indeed, a number of jurisdictions have rejected such claims. See, e.g., *Sims v. State*, 754 So.2d 657, 668 (Fla. 2000); *State v. Carter*, 89 Ohio St.3d 593, 608, 734 N.E.2d 345 (2000); *Ritchie v. State*, 809 N.E.2d 258, 262 (Ind. 2004); *Wheeler v. Commonwealth*, 121 S.W.3d 173, 186 (Ky. 2003). Today, we join these jurisdictions in holding that death by lethal injection is not per se cruel and unusual punishment."

Bryant v. State, 951 So.2d 732, 747–48 (Ala.Crim.App. 2003), cert. denied, 951 So.2d 732 (Ala. 2006), cert. denied, 549 U.S. 1324, 127 S.Ct. 1909, 167 L.Ed.2d 569 (2007). (Footnote omitted.)

XXI.

Morris argues that his conviction and sentence are due to be reversed based on the cumulative effect of the previously alleged errors.

> """The Alabama Supreme Court has set forth the cumulative-error rule as follows: '[W]hile, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, if the accumulated errors have "probably injuriously affected substantial rights of the parties," then the cumulative effect of the errors may require reversal.' *Ex parte Woods*, 789 So.2d 941, 942–43 n .1 (Ala. 2001) (quoting Rule 45, Ala.R.App.P.). Applying this standard to Lewis's allegation of cumulative error, we have scrupulously reviewed the record and find no evidence that the cumulative effect of any of the individually nonreversible errors in this case affected Lewis's substantial rights at trial.'"

"*Sharifi v. State*, 993 So.2d 907, 946–47 (Ala.Crim.App. 2008) (quoting *Lewis v. State*, [Ms. CR-03-0480, April 28, 2006] __ So.3d __, __ (Ala.Crim.App. 2006))."

Brown v. State, [Ms. CR-07-1958, November 13, 2009] __ So.3d __, __ (Ala.Crim.App. 2009.)

In the present case, when we review the record and the errors previously discussed, there is no indi-

cation that they affected Morris's substantial rights at trial.

XXII.

According to Rule 45A, Ala.R.App.P., we have searched the entire proceedings for any plain error. In so doing, we note that the record of the proceedings does not affirmatively show that the petit jury was sworn as to their oath of service. (R. 107.) However, the case-action summary reflects that the jury was sworn and the record does show parenthetically that the venire-members were administered their oath before voir dire examination. (C. 47, R. 13.) Therefore, there is no error, plain or otherwise, because of this omission. *Ex parte Lee,* 989 So.2d 504, 506 (Ala. 2008).

Further, pursuant to § 13A-5-53, Ala.Code 1975, we are required to address the propriety of Morris's sentence of death. It is the finding of this Court that there is no error in the sentencing that adversely affected Morris's rights.

The trial court found the existence of three aggravating circumstances: that Morris had previously been convicted of another felony involving the use of violence to the person, specifically second-degree assault, § 13A-5-49(2), Ala.Code 1975; that Morris intentionally caused the death of Rochester during the commission of first-degree robbery, § 13A-5-49 § 4), Ala.Code 1975; and that Morris intentionally caused the death of Rochester during the commission of first-degree burglary, § 13A-5-49(4), Ala.Code 1975.

The trial court further found the existence of no statutory mitigating circumstances. Moreover, the trial court found that Morris presented no nonstatutory mitigating circumstances at the sentencing hearing, and the trial court found none to be present in this case.

In weighing the aggravating circumstances against the mitigating circumstances, the trial court determined that "[a]fter consideration of all the matters that were presented to [the] Court, the testimony heard at trial, and the sentencing hearing before [the] Court, both in mitigation and by aggravation, taking into account all other matters that were proferred before [the] Court," the aggravating circumstances outweighed the mitigating circumstances. (C. 64.) The trial court's findings concerning the aggravating and mitigating circumstances are supported by the record.

It is the finding of this Court that death is the proper sentence in this case. After carefully reviewing the record of both the guilt and sentencing phases of Morris's trial, we conclude that there is no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. Section 13A-5-53(b)(2), Ala.Code 1975, requires this Court to weigh the aggravating circumstances and the mitigating circumstances independently to determine the propriety of Morris's sentence of death. An independent weighing of the aggravating and mitigating circumstances indicates that the trial court properly determined that the aggravating circumstances outweighed the miti-

gating circumstances and that death is the proper sentence.

As required by § 13A-5-53(b)(3), Ala.Code 1975, this Court must determine whether Morris's sentence was disproportionate or excessive when compared to the penalties imposed in similar cases. The sentence of death in this case is neither disproportionate nor excessive to the penalties imposed in similar cases, considering the circumstances surrounding both the crime and Morris. *See, e.g., Belisle v. State,* 11 So.3d 256 (Ala.Crim.App. 2007), cert. denied, 11 So.3d 323 (Ala. 2008), cert. denied, __ U.S. __ (2009); *Saunders v. State,* 10 So.3d 53 (Ala.Crim.App. 2007), cert. denied, 10 So.3d 53 (Ala. 2008), cert. denied, __ U.S. __, 129 S.Ct. 2433, 174 L.Ed.2d 229 (2009.)

For the reasons expressed here, Morris's convictions and sentences are affirmed.

AFFIRMED.

WELCH and KELLUM, JJ., concur. WISE, P.J., concurs in the result. WINDOM, J. recuses herself.

Appendix B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

April 16, 2010

CR-07-1997 **Death Penalty**

Alfonzo Morris v. State of Alabama (Appeal from Jefferson Circuit Court: CC97-5397)

NOTICE

You are hereby notified that on April 16, 2010 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/

Lane W. Mann, Clerk
Court of Criminal Appeals

cc: Hon. Tommy Nail, Circuit Judge
Hon. Anne-Marie Adams, Circuit Clerk
Anna P. Engh, Attorney – Pro Hac
Gregory M. Lipper, Attorney – Pro Hac
Randall S. Susskind, Attorney
Joshua Bearden, Asst. Attorney General

Appendix C

IN THE SUPREME COURT OF ALABAMA

September 17, 2010

1091052

Ex parte Alfonzo Morris. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Alfonzo Morris v. State of Alabama) (Jefferson Circuit Court: CC97-5397; Criminal Appeals : CR-07-1997).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 17, 2010:

Writ Denied. No Opinion. Woodall, J. - Lyons, Stuart, Smith, Bolin, Parker, and Shaw, JJ., concur. Murdock, J., dissents. Cobb, C.J., recuses herself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 17th day of September, 2010.

/s/ Robert G. Esdale

Clerk, Supreme Court of Alabama

Appendix D

IN THE CIRCUIT COURT,
TENTH JUDICIAL CIRCUIT
JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case Number:
	)	CC-1997-5397
ALFONSO MORRIS,	)	
	)	
Defendant.	)	

ORDER

The Defendant in this case, Alfonso Morris, was charged by indictment by the Grand Jury of the Tenth Judicial Circuit of Alabama, in and for Jefferson County, Alabama, with a two-count indictment. Count I charged the capital offense of murder during burglary in the 1st degree. Count II of the indictment charged the capital offense of murder during a robbery in the 1st degree.

The charges in this indictment were brought under the provisions of the Alabama Death Penalty Statute, under Alabama Code § 13A-5-40(a)(4) and § 13A-5-40(a)(2). Subsequent to the indictment being returned by the November 1997 Grand Jury, the case was set for pre-trial on January 9, 1998 and was

subsequently set for trial on February 22, 1999. On motion of Defendant's attorneys, Defendant was ordered examined by Dr. Ackerson for competency to stand trial on February 12,1999. On February 23, 1999 the Defendant entered a special plea of not guilty by reason of mental disease or defect. The Honorable James Garrett, Circuit Judge, received a forensic evaluation from Dr. Ackerson on June 28, 1999. A competency hearing was conducted by the Honorable James Garrett, Circuit Judge, and he ordered the Defendant be sent to the Taylor Hardin Secure Medical Facility for competency testing and training as per Dr. Ackerson's findings on December 13, 1999. This matter was set for competency hearing on August 7, 2000, July 30,2001, October 15, 2001, December 17, 2001, and December 9, 2002. On December 9, 2002, the Honorable James Garrett received testimony as to Defendant's competency. On January 20, 2003, Judge Garrett found the Defendant competent to stand trial. Upon Judge Garrett's retirement, the case was reassigned to the Honorable Laura Petro, Circuit Judge, for trial. On January 27, 2003, the Honorable Laura Petro recused herself, and this case was reassigned to the Honorable Tommy Nail, Circuit Judge, for trial. The case was subsequently set for trial on March 31, 2003.

The case proceeded to trial on March 31, 2003 and a jury of fourteen (14) men and women duly empanelled and sworn as required by law heard the evidence in this case, whereupon the jury, after hearing the evidence and being charged as to the applicable law and upon consideration of the law and evidence, and the number of the jury being diminished by two

(2) as provided by law, the twelve (12) remaining jurors found the Defendant guilty of the capital offense as charged in Count I of the indictment and guilty of the capital offense as charged in Count II of the indictment. The jury was polled and the verdict was unanimous in finding said Defendant guilty of the capital offenses. The verdict was returned by the jury on April 3, 2003 and was announced by the Court on said date. Subsequent to the jury finding the Defendant guilty of the capital offense, the Court commenced a sentencing hearing before the same jury as required by Alabama Code §13A-5-45.

After due deliberation, the jury returned a verdict fixing the Defendant's punishment at death. The jury was individually polled as to whether the verdict and the enumeration of the verdict as set out on the verdict form was proper and each juror said that that was the proper vote as to punishment of the defendant and the recommendation of the jury was ten (10) jurors recommended that the Defendant be sentenced to death and two (2) jurors recommended that the Defendant be sentenced to life without the possibility of parole.

At the sentencing hearing on May 30, 2003, no additional evidence was presented to the Court as to what the punishment should be and the Court did affix the punishment and did sentence the Defendant to death by lethal injection.

On November 23, 2005, the Alabama Court of Criminal Appeals issued an opinion reversing the Defendant's two capital murder convictions on the ground that he was denied funds to hire an inde-

pendent psychologist or psychiatrist. On December 7, 2005, the State of Alabama requested that the Court of Criminal Appeals reconsider and reverse its decision; that request was denied by the Court of Criminal Appeals.

The case was returned to this Court, and Defendant made a motion for funds for a mental evaluation of the Defendant. This Court granted said motion for the Defendant, and he was evaluated by Dr. Allen E. Shealy, Ph.D., who rendered a report on July 6, 2007.

On November 26, 2007, this Court held a hearing pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed2d 335 (2002) and Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004). Dr. Allen Shealy and Faye Morris testified on behalf of the Defendant, and Dr. Glenn King, Wyatt Rhone, Ned Whitehead, Vickie Webster, and Steve Drexler testified on behalf of the State of Alabama. Faye Morris testified that her brother Alfonso Morris was a slow learner, could not take care of his basic needs, could not live alone and always lived with his parents. Dr. Shealy testified that based on his testing of Alfonso Morris and his review of records it was his opinion that Alfonso Morris was mentally retarded with IQ scores of 57 Verbal, 51 Performance and 50 Full Scale on one exam. Dr. Shealy also testified that Morris told him that he (Morris) did not have relationships with his siblings and was not sure if any of them knew where he (Morris) was. For the State, Ned Whitehead presented jail visitation records indicating that Morris' sister Faye visited him twice before the interview done by Dr. Shealy and once on

the day after the interview. Wyatt Rhone testified about his attempts to educate Alfonso Morris prior to the first trial. He told the Court that he gave Morris a test for knowledge of courtroom procedure before his education sessions began, and Morris scored zero. At the conclusion of six one-hour education sessions, Rhone again administered an exam for knowledge of courtroom procedure, and Morris scored another zero. Rhone testified that of the 1500 or so such exams he had given in the past, only a handful of defendants had scored zero. Vickie Webster, a nurse in the Jefferson County jail, testified that Alfonso Morris had no trouble reciting his medical history and filling out sick call requests. Det. Phillip Russell and Steve Drexler testified for the State regarding certain handwritten documents. Russell testified that when Morris was interviewed on the day of his arrest, he identified himself using his brother's name and date of birth as it were his own. Russell also testified that upon this Court's order, he took a handwriting standard from Morris in 2003. Steve Drexler testified that he saw evidence of deception in that handwriting standard but that he was able to ascertain an accurate depiction of Morris' name as he would naturally print it. Drexler testified that it was his expert opinion that the person who gave the standard was also the same person who wrote several letters to the circuit clerk found in this Court's file as well as a lengthy amendment to a federal court complaint filed by Morris against the Jefferson County Sheriff. That handwritten amendment contains a very detailed and coherent narrative of Morris' medical treatment in the Jefferson County jail. Dr. Glen King testified that in his opinion Alfonso

Morris was not mentally retarded but instead was malingering. Dr. King testified that Morris achieved scores typical for a 5 or 6-year-old child in verbal and nonverbal categories. Dr. King testified that he performed tests to assess whether Morris was malingering. Dr. King told the Court that on one such test, random guessing should produce scores in the neighborhood of 25. Dr. King testified that Morris scored 16, 15 and 13 on the three occasions he took that test. Dr. King further testified that Morris had a high borderline to low average range of intellectual ability and that Morris had adaptive functioning to match that level of intellectual ability. At the conclusion of the hearing, this Court ruled that the defendant had not met the burden of proving by a preponderance of the evidence that he was mentally retarded and thus ineligible for the death penalty.

The case was retried on May 5, 2008. The Defendant withdrew his plea of not guilty by reason of mental disease or defect. The jury of fourteen (14) men and women duly empaneled and sworn as required by law heard the evidence in this case, whereupon the jury, after hearing the evidence and being charged as to the applicable law and upon consideration of the law and evidence, and the number of the jury being diminished by two (2) as provided by law, the twelve (12) remaining jurors found the Defendant guilty of the capital offense as charged in Count I of the indictment and guilty of the capital offense as charged in Count II of the indictment. The jury was polled and the verdict was unanimous in finding said Defendant guilty of the capital offenses.

The verdict was returned by the jury on May 8, 2008, and was announced by the Court on said date.

Subsequent to the jury finding the Defendant guilty of the capital offense, the court commenced a sentencing hearing before the same jury as required by Alabama Code § 13A-5-45.

After opening statements by the attorneys, the State moved that the evidence that was presented in the guilt phase of the proceedings be considered by the jury in the punishment phase of the proceedings, which said motion was granted.

The State presented evidence of three (3) aggravating circumstances, that being that the capital offense was committed by a person during the commission of a robbery 1° pursuant to §13A-5-49(4); that the capital offense was committed by the Defendant during the commission of a burglary 1° pursuant to §13A-5-49(4), and that the Defendant was convicted of another capital offense or a felony involving the use of violence to the person, pursuant to § 13A-5-49(2). In addition, the State offered eight (8) certified records of the Defendants eight (8) prior convictions to rebut the mitigating factor that the Defendant has no significant history of prior criminal activity pursuant to §13A-5-51(1).

The attorneys for the defense called Faye Morris, the sister of the Defendant, who became emotional on the stand and said she could not testify on behalf of the Defendant. The defense asked the Defendant's other sister who was in the courtroom, Debra Morris,

if she would be able to testify on the Defendant's behalf, and she stated that she could not testify.

After summation, first by the State, then by the Defense, the Court then charged the jury that if the mitigating circumstances outweighed the aggravating circumstances as presented to the jury, then they should recommend the punishment of life imprisonment without eligibility for parole, if the aggravating and mitigating circumstances weighed equally then they should recommend the punishment of life imprisonment without eligibility for parole, and if the aggravating circumstances outweighed the mitigating circumstances then the recommended punishment should be death. After due deliberation, the jury returned a verdict recommending death as the Defendant's punishment. The jury was individually polled as to whether the verdict and the enumeration of the verdict as set out on the verdict form was proper and each juror said that that was the proper vote as to punishment of the defendant and the recommendation of the jury was ten (10) jurors recommended that the Defendant be sentenced to death and two (2) jurors recommended that the Defendant be sentenced to life without the possibility of parole.

FINDING OF FACTS FROM THE TRIAL

After said hearing, the Court makes the following findings of fact from the trial:

The homicide which was the basis for the charge as set out in this indictment occurred on February 24, 1997 between the hours of 9:30 p.m. and 11:30 p.m. at the victim's home located at 6816 2nd Avenue

South, Birmingham, Jefferson County, Alabama. The time of occurrence could only be estimated as one of the witnesses talked with the victim by telephone sometime between 9:30 and 10:00 p.m. and another witness saw the victim in her living room floor around 11:30 p.m. The victim, Miriam Rochester, was beaten to death during a burglary 1° and robbery 1° of her home located at 6816 2nd Avenue South, Birmingham, Alabama, on February 24, 1997. The body was discovered by the victim's roommate's son, Daniel Russell, when he came to the residence to check on the victim. On arriving he discovered a forced entry at the rear entrance. He left to contact his brother Charles Russell. They subsequently called 911 and waited on the arrival of Birmingham Police officers. While waiting for police to arrive, Daniel Russell looked in a living room window and saw the victim lying on the floor. Police subsequently searched the house and found the victim to be deceased. Charles Russell identified several items of jewelry belonging to his mother and at least one item belonging to the victim. That jewelry was recovered from the person of the Defendant upon his arrest several hours after the discovery of the victim's body.

Juanita Patterson, a now retired Birmingham Fire and Rescue employee, responded to a medical call at the residence of the victim and transported Elizabeth Russell, the victim's roommate, to the hospital earlier in the evening. She confronted the Defendant at that time, who was attempting to enter the residence, even though he had been advised to leave the area. Approximately 11:30 p.m., some two

(2) to two and a half (2.5) hours after this call, she was dispatched to this residence a second time when the victim's body was discovered. She gave police officers a description of the Defendant at this time, which went out as a BOLO.

The Defendant was taken into custody at approximately 5:00 a.m. A search of his person recovered jewelry identified as belonging to the victim and her roommate. In addition, the Defendant's shoes were recovered, which had blood stains which were identified through DNA testing as the blood of the victim, Miriam Rochester. Evidence Technician Shirley Jackson recovered an un-smoked cigarette from near the victim's body which was identified through DNA testing as containing DNA that matched the Defendant, Alfonzo Morris. She described the forced entry located at the rear entrance as well as the evidence of the house being ransacked. The victim's empty wallet was also found on the floor next to the victim's body.

Officer Eric Smith with the Birmingham Police Department responded to the call at the victim's residence. He found the house had been ransacked and Ms. Rochester in the hallway face down. Her wig had been knocked off and her dentures had been knocked out of her mouth. He took a description of a person from Juanita Patterson, who had been to the residence earlier, of a black male wearing camouflaged pants and black ball cap who had attempted to enter the victim's residence. This officer, two hours later at approximately 5:00 a.m., observed the Defendant two blocks from the homicide scene. The Defendant was staggering down the street and was ar-

rested for public intoxication. A search incident to arrest revealed costume jewelry which was later identified as belonging to the victim and her roommate. A cigarette were also recovered from the Defendant, which matched the same brand of the cigarette recovered at the scene with the Defendant's DNA.

Dr. Gary Simmons with the Jefferson County Medical Examiner's Office testified that the cause of death was due to blunt force injuries to the head of the victim. The top of the head had four (4) lacerations, one to the forehead and three (3) to the back of the head, which resulted in multiple scull fractures.

Angelo Della Manna, a forensic scientist with the Alabama Department of Forensic Sciences, testified that he compared the known DNA sample obtained from the blood of the victim with the DNA sample obtained from the blood recovered from the Defendant's shoes and that it matched the DNA of the victim, Miriam Rochester. In addition, he recovered a DNA sample from the filter of the cigarette recovered from near the body of the victim and compared it with the known DNA sample of the Defendant and they matched.

The Defendant testified on his own behalf. He gave a full and complete chronology of his whereabouts on the evening of February 24, 1997 through the early morning hours of February 25, 1997. The Defendant said he was at his house with his roommate until approximately 10:00 p.m., when he left, met up with some more friends, gambled and won the jewelry in a craps game. He said he was arrested

by the police around 5:00 a.m. and taken back to the crime scene. He further testified that a small dog, which must have been the victim's dog as seen in one of the scene photographs, brushed up against his shoes and that is how the victim's blood was transferred onto his shoes. He could offer no explanation how his DNA was on a cigarette in the victim's house, other than to say the police must have substituted the cigarette seized at his arrest for the cigarette found at the scene.

FINDINGS OF FACT FROM THE PUNISHMENT HEARING

At the punishment phase of the trial before the jury, the State requested and it was granted that the evidence introduced in the trial in chief be incorporated into the punishment phase before the jury. The first aggravating circumstance to be considered was that the Defendant had previously been convicted of another capital offense or a felony involving violence to the person. The State offered State's Exhibit 90, which is a certified copy of a prior conviction in case number CC1981-2173 of the Defendant, wherein he was convicted of assault in the 2nd degree and was sentenced to a term of two years in the State Penitentiary. A second aggravating circumstance offered by the State was that the capital offense occurred during the commission of a burglary in the 1st degree. The third aggravating circumstance was that the capital offense occurred during the commission of a robbery in the, 1st degree. The only testimony taken during the punishment phase was from the Defendant's sister, Faye Morris, who after being sworn, stated her name and then became

emotional and said she could not testify and only asked the jury to spare her brother's life.

At the conclusion of said bearing and summation of the attorneys, the Court again charged the jury as to the applicable law. The Court enumerated the aggravating circumstances as being that the capital offense was committed by the Defendant, who had previously been convicted of another capital offense or a felony involving the use of violence to the person. Second, the capital offense was committed during the commission of a burglary in the 1st degree. Third, the capital offense was committed during the commission of a robbery in the 1st degree. The Court further charged on all the statutory mitigating circumstances as set out in Alabama Code §13A-5-51 and informed the jury that they were not bound by only the statutory mitigating circumstances, but may consider any other circumstances in mitigation. The Court further charged the jury that in determining the punishment, the jury must avoid any influence of passion, prejudice, or any other arbitrary factor. The Court further charged that the burden on the State was to prove the aggravating circumstances beyond a reasonable doubt and to a moral certainty; however, the mitigating circumstances need only be proven to their reasonable satisfaction. The Court further charged the jury that the test is not the numerical number of aggravating circumstances as opposed to the number of mitigating circumstances or the number of mitigating circumstances as opposed to the aggravating circumstances, but the seriousness of the gravity of the aggravating circumstances and the mitigating circumstances as shown by the mitigating

circumstances proven to the jurors' reasonable satisfaction.

The jury, after due deliberation, recommended the punishment of death and on questioning the jury individually, the Court determined that the vote of the jury in favor of death was correctly shown as on the verdict form as ten (10) jurors recommended punishment to be fixed at death and two (2) jurors recommended punishment be fixed at life without the possibility of parole. The Court further makes the finding that in fixing the punishment, the jurors were not influenced by passion, prejudice, or any other arbitrary factors.

FINDINGS OF FACTS FROM THE SENTENCING HEARING BY THE COURT

On this, the 20th Day of June, 2008, the Defendant, Alfonzo Morris, coming into Court with his counsel, Hon. Billy Jewel and Hon. John Tindle, and Deputy District Attorneys Laura Poston and Alan Baty, this Court having been the trial court and having heard all testimony in this matter adopts all evidence previously presented at the guilt phase of the proceedings and the sentencing phase of the proceedings, both proceedings being held before the Court and the evidence being presented before the jury in both hearings is incorporated in this hearing to be considered by the Court in affixing punishment.

The Court finds from the evidence that three (3) aggravating circumstances were proven beyond a reasonable doubt. The first is that the Defendant had previously been convicted of another capital of-

fense or a felony involving the use of violence to the person, to-wit assault in the 2nd degree as set out in § 13A-5-49(2). The second aggravating circumstance present was under §13A-5-49(4) that the Defendant intentionally caused the death of the victim during the commission of a robbery in the 1st degree. The third aggravating circumstance present was under § 13A-5-49(4), that the Defendant intentionally caused the death of the victim during the commission of a burglary in the 1st degree.

The Court finds specifically that statutory aggravating circumstance number one, under 13A-5-49(1) is not applicable in this case, in that the Defendant was not under a sentence of imprisonment when this offense was committed.

The Court finds specifically that aggravating circumstance number three, under 13A-5-49(3) was not applicable in this case, in that this Defendant did not knowingly create a great risk of death to many persons.

The Court finds specifically that aggravating circumstance number five, under 13A-5-49(5) is not applicable in this case in that the offenses were not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The Court finds specifically that aggravating circumstance number six under 13A-5-49(6) was not applicable in this case, in that the offenses were not committed for pecuniary gain.

The Court finds specifically that aggravating circumstance number seven, under 13A-5-49(7), was not applicable in this case, in that the offenses were not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

The Court specifically finds that aggravating circumstance number eight, under 13A-5-49(8), is not applicable in this case, in that the offenses were not especially heinous, atrocious, or cruel compared to other capital offenses.

The Court specifically finds that aggravating circumstance number nine, under 13A-5-49(9), is not applicable in this case, in that the Defendant did not intentionally kill two or more persons by one act or pursuant to one scheme or course of conduct.

The Court specifically finds that aggravating circumstance number ten, under 13A-5-49(10), is not applicable in this case, in that these offenses were not one of a series of intentional killings committed by the Defendant.

MITIGATING CIRCUMSTANCES

The Court does not find statutory mitigating circumstance number one under §13A-5-51(1) to be present, to-wit: The Defendant has a significant history of prior criminal activity because according to the pre-sentence investigation as prepared by the Alabama Board of Pardons and Paroles, the Defendant has a significant criminal background and has previously been convicted of eight (8) felony convictions

for burglary 3rd degree, theft of property 2nd degree, and theft of property 1st degree. The State of Alabama introduced duly certified copies of Defendant's eight (8) felony convictions at the sentencing hearing.

The Court does not find circumstance number two under §13A-5-51(2) to be applicable in this case as there was no evidence presented that the defendant was under the influence of any extreme mental or emotional disturbance.

The Court does not find circumstance number three under §13A-5-51(3) to be applicable in this case as the victim, Miriam Rochester, was not a participant in the Defendant's conduct, and she did not consent to it.

The Court does not find circumstance number four under §13A-5-51(4) to be applicable in this case as there was neither an accomplice, nor was the Defendant's participation relatively minor.

The Court does not find circumstance number five under §13A-5-51(5) to be applicable in this case as there was no evidence presented that the Defendant acted under extreme duress or under the substantial domination of another person.

The Court does not find circumstance number six under §13A-5-51(6) to be applicable in this case as there was no evidence that the Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The Court does not find circumstance number seven under §13A-5-51(7) to be applicable in that the Defendant was thirty six (36) years of age at the time he committed this offense.

There were no non-statutory mitigating circumstances presented at the sentencing hearing, and this Court specifically finds that there are no non-statutory mitigating circumstances present in this case.

After consideration of all the matters that were presented to this Court, the testimony heard at trial, and the sentencing hearing before this Court, both in mitigation and by aggravation, taking into consideration all other matters that were proffered before this Court as here and above stated in this order, and disregarding pleas or references to the Court to consider the sentence on the basis of passion or prejudice, the Court does now find and is convinced beyond a reasonable doubt and to a moral certainty that the aggravating circumstances outweigh the mitigating circumstances and as such are sufficient to uphold the jury's recommendation of punishment at death.

It is therefore the judgment of this Court that the Defendant should be sentenced to death.

DONE AND ORDERED this the 20th day of June, 2008.

/s/

Tommy Nail
Circuit Judge

C [sic]:

Billy Jewel
John Tindle
Laura Poston
Alan Baty

Appendix E

Jefferson County Circuit Court
State of Alabama v. Alfonso Morris
Case No. CC-1997-5397

Oral Ruling of Judge Nail Following *Atkins* Hearing
(Nov. 26, 2007)

THE COURT: The problem you have here, Mr. Tindle, is this: when you try to square the experts', all of them, testimony with the test laid out by Atkins and the Alabama Supreme Court, it boils down to this: They say it's a three prong test. The defendant has to have significant subaverage intellectual functioning, i.e, an IQ of seventy or below. The problem is none of these experts can give you a true IQ score because he's malingering, okay? So how do I square that with what they say in Atkins?

Secondly, they say that he must have significant or substantial deficits in adaptive behavior. Well, from what I've seen and heard from the hearing we've had today, he certainly is able to adapt and to function. I mean, anybody that can't add two and one but can go out here and sell marijuana on the streets like he told the probation officer he did can count and add better than that because otherwise he'd have starved to death selling marijuana on the streets.

And, three, that these manifestations of these deficits in adaptive behavior and problems have to develop before he's eighteen. Well, school records don't substantiate that. They say he's functioning at

an average grade level, contrary to what the family members say. I mean, I would think they've got a vested interest in this issue. The school people didn't have an issue. They didn't even know this issue was going to even arise twenty-five years ago when he was in school, or however long it's been.

And in addition, all three of these factors must be met in order for a person to be classified as mentally retarded for purposes of an Atkins claim. I don't know how I can rely on anything but look at his adaptive behavior when nobody can give me a clear-cut answer as to what his real functioning IQ is. So, there you have it. That's it in a nutshell as I see it.

Now, the appellate courts haven't given us a brightline test, they haven't give us any definitive answers, they've just given us generalities and expect us to come up with the specifics. Well, the best I can do is tell you he seems to be able to function when he wants to function, and he seems to be able to adapt when he wants to adapt.

It's only when he's faced with serious consequences like the death penalty that he can't add two and one or tell you identify a cat in a picture or a card. Now, you tell me what the answer to the problem is.

MR. TINDLE: I believe that the prior experts have said that he does suffer from mental retardation, at least for the record.

THE COURT: Well, they also all acknowledge he's malingering. And of course they can't tell you

how to factor that in—well, Dr. King has give us his opinion what he thinks his true IQ is, the general range of it. The others just wouldn't give us a specific answer. We got a generalized answer out of them. Well, it could be a little higher. Well, how much higher? They don't know or they refuse to give an educated guess.

So I'm left with the position I've got to make a decision here whether or not he's eligible for the death penalty. And based on the only information I have about his adaptive behavior, it sounds like to me he's fully capable of adapting and surviving and understanding what he's doing. He's not mentally retarded under the definitions in Atkins, in my opinion. Now, that's my position and that's my ruling. If you want to go ahead and ask him some more questions, you go right ahead.

MR. TINDLE: Judge, I do want to put a couple of other things on the record, although—

THE COURT: You can put all you want on the record. You know, a jury may—this issue can still be litigated in front of the jury in a sentencing hearing if we get there and they may buy it, but I don't.

MR. TINDLE: Anyway, I would submit to the Court that, yes, he does meet the Atkins criteria. And also in addition, he should not be eligible for the death penalty consideration. I would also submit that under Ring versus Arizona, 122 S.Ct. 2428 that the defendant has the right to submit Atkins testimony during the guilt phase.

THE COURT: Isn't that what I—no, not in the guilt phase. If it comes out, it'll come out in the penalty phase.

MR. TINDLE: Well, that's what we would submit to the Court under Ring versus Arizona.

THE COURT: Well, you can submit it, but my ruling is no, it won't come out because it's not—that's a diminished capacity defense and Alabama does not recognize diminished capacity. If it's a mitigating factor for the jury to consider in an aggravation and mitigation hearing, they can consider it. It'll be up to them to decide whatever weight they choose when they come up with a recommendation, but it's not admissible in the guilt phase, in my opinion. That's my ruling.

Anything further?

MR. TINDLE: That's it. Thank you, Judge.

Appendix F

Jefferson County Circuit Court
State of Alabama v. Alfonso Morris
Case No. CC-1997-5397

Excerpts from *Atkins* Hearing Testimony of
Dr. Allen Shealy (Nov. 26, 2007)

ALLEN SHEALY,
having been duly sworn, was examined and testified as follows:

. . .

Q. And for the record, would you tell the judge what your education and training is.

A. Yes. I have a doctorate Ph.D. in psychology from the University of South Carolina, internship at Central State Hospital in Milledgeville, Georgia for a year, specializing in forensic cases, then I came to Birmingham in 1969 and took a job at UAB as assistant professor, and I was there until 1983. I left as professor in the department of criminal justice, department of psychiatry and department of psychology and I have an appointment now as adjunct professor in the department of psychiatry at UAB.

I taught five years at Cumberland Law School in psychology and law in the '70's. And then I have my diplomate from the American Board of Professional Psychology in the specialty of forensic pathology. Li-

censed in Alabama, license number one hundred, as a psychologist.

Q. You said you were licensed by the American Board of Professional Psychology in the specific area for forensic psychology, correct?

A. Yes.

Q. How many psychologists are certified that way in the State of Alabama, to your knowledge?

A. Let me correct my statement. I'm not licensed by them, I'm Board certified by them.

Q. Correct.

A. And there are now about two hundred and fifty to three hundred in the country and three of us in Alabama; Dr. Ackerson, Dr. Paul Lees-Haley in Huntsville and myself.

. . .

Q. After your examination and your testings that you said you have performed on the defendant on the first report you have right there, what was—in your professional opinion, what conclusions were you able to reach based on the testings, the interviews and applying your education and training to that, what conclusions were you able to draw?

A. Based on all the things that I've mentioned already in my evaluation, I also reviewed reports of

previous psychological evaluations, previous adaptive behavior evaluations including evaluations done by Dr. Kimberly Ackerson, evaluation—a more recent evaluation done by Dr. King, and the hospital records from his six week hospitalization at Taylor Hardin.

And the first conclusion that I reached was although the question had been raised in his previous trial about trial competency, I concluded that I believed that he was competent. In my opinion he had the psychological characteristics that would lead to a likely judicial finding of competency to stand trial. I didn't have any questions about mental state at the time of the offense that would rise to the level of an insanity defense under the Alabama statute.

And the third question that was raised had to do with the Atkins question in terms of mental retardation, and as the judge has said, the Atkins versus Virginia case in 2002 which ruled that mentally retarded people are not eligible for the death penalty because of cruel and unusual punishment.

Q. And what were your findings on your first report that you did as to the conclusion as to whether or not this defendant is mentally retarded or not?

A. Yes. I concluded that he was mentally retarded and was in the range of mild mental retardation and had a full-scale IQ of fifty which falls below the first percentile of the general population.

. . .

Q. Okay. Let me ask you this as far as malingering goes, can you tell me can a mentally retarded person malinger?

A. Yes. A person with mild mental retardation is capable, one of the studies I've read, is capable of—is capable of taking a malinger's test and scoring in the range that would indicate that he's malingering, even if he's mentally retarded. So the conclusion that because somebody is malingering on a malinger's test does not lead one to the automatic conclusion that the person is not mentally retarded. It would lead to the conclusion by that examiner that he's functioning somewhat higher than the obtained IQ score which in that case was an IQ of forty something that Dr. King—I'm referring to his evaluation. He's the one who administered the TOMM, the test of memory malingering.

And the other thing is, the reason for—one of the reasons given in the literature discussing Atkins and making recommendations to state legislatures about responding—legislation responding to Atkins, one of the reasons given for the third prong, which is that the mental retardation had to be manifested before the age of eighteen, is because of the issue of malingering because that makes the issue of malingering moot if there's evidence that the mental retardation has existed since childhood.

And in this case since we had an IQ in the range of—certainly could overlap into the range of mild mental retardation of seventy-three, we know that

there's evidence of significant impairment in intellectual functioning from childhood. We also know from the school records that he was in special education classes. That's according to the psychological report done at Taylor Hardin during his hospitalization. We know that he was—their comments in the school records in two of his grades, I believe 1971 school year and 1973 school year, that he was a slow learner.

And so if we know from the history that he's been mentally retarded since six years old, it makes the issue of whether he's malingering in adulthood moot, and that's been pointed out by the Atkins—articles discussing the Atkins as to the reason why it's important to go back, there's two reasons really, it's important to go back to childhood because of the issue of malingering, but also the onset before age eighteen is included in the AAMR definition as a criterion and the DSM definition of mental retardation.

Q. Let me ask you, this TOMM test as you call it, the test for malingering, have there been any studies regarding this test to show its validity?

A. Yes. There's a 2006 publication that found that it's not appropriate to be administered to people who are mentally retarded. And found a significant number of false positives in people who were mentally retarded who weren't facing any court charges, who were just in institutions for mentally retarded. And the recommendation was that any test of malingering, looked at the TOMM and two other tests of malingering, should be viewed with extreme caution when they're used with mentally retarded subjects.

. . .

THE COURT: Can I ask Dr. Shealy a question? Do you have any objection, Mr. Tindle?

MR. TINDLE: Go ahead, Judge.

THE COURT: Do y'all have any objection?

MR. BATY: There was some stuff that we weren't going to get into for this hearing.

THE COURT: Well, I don't think it has anything to do with whatever y'all want to do.

MR. BATY: Okay.

THE COURT: Dr. Shealy, I notice you said his high school records of whenever they were he had a full scale IQ of seventy-three; is that what you testified to earlier?

THE WITNESS: I testified that he had a primary mental abilities test that was given by the school and he had an IQ of seventy-three.

THE COURT: Does that equate to the same type of tests that you and all these other experts have administered—

THE WITNESS: It's a good question.

THE COURT: —to the defendant? I mean, I'm having a hard time—

MR. TINDLE: I was getting to asking that too.

THE COURT: —to understand how when he's in school he's got a full scale IQ of seventy-three and now all of a sudden it's down in the fifties or forties. Can you elaborate a little bit on that?

THE WITNESS: Yes, sir.

THE COURT: So I'll understand?

THE WITNESS: First of all, primary mental abilities test was a group administered test in school and it correlates well with Stanford Binet and the Wechsler Scales but it's not nearly as reliable a test as the individually administered test.

Number two is one of the things—I'm about to get into something that's somewhat controversial but—

THE COURT: I understand.

THE WITNESS: —studies that have been published in the last few years have found that every ten years the general population increases by about three IQ points. So if a person is given a test—the primary mental abilities test was published—and that's called, by the way, the Flynn Effect.

THE COURT: I've heard of the Flynn effect.

THE WITNESS: In 1962 that primary mental abilities test that he was given in school was published which means the norms were done at least no later than 1962. He took the test in 1967 so we have five years, and a few say three points per decade decline, point three points per year, that amounts to one and a half points of IQ that we would expect. He would actually have been lower if current norms had been used. So some psychologists actually adjust IQ scores for that. I think that's going beyond what—

THE COURT: Yeah, I'd hate to be tested under that theory today, Doctor. They might take me off the bench.

THE WITNESS: Well, let me say that it's important to understand, and this has been I think confused in some testimony even, that we're not saying that from age six to age forty-six, which he is now, that he can decline by point three points per year for forty years. We're talking about the time the test was standardized and the time it was given to him that there's a decay in the—

THE COURT: I got you. I'm with you I think now.

THE WITNESS: The reason, by the way, I think—you've asked also about the variability of scoring seventy-three at that time and later scoring in the fifties and forties. I don't have an argument with Dr. King's conclusion that his motivation might have been less than optimal at different times that

he was tested. There are sometimes the testing conditions, the approach of the examiner, a lot of things can affect that. What I'm saying is that there's clear evidence that he was mentally retarded before he was ever in the criminal justice system and that makes moot the issue of malingering.

THE COURT: Okay. I follow you.

Mr. Tindle, go ahead.

Q. (BY MR. TINDLE) And I need to make this clear for the record. Did Dr. King use the TOMM test—

A. Yes.

Q. —to try to establish malingering?

A. Yes. He concluded that based on the time responses he was malingering.

Q. And based on your education and training and knowledge, do you believe that test to be reliable?

A. Well, first of all, it's never been—it's not appropriate—based on the studies that I have reviewed, it's not appropriate to be used with mentally retarded people, and it misclassifies a number of them as malingering when they have no reason to malinger. They've been given instructions for optimal performance and they're in an institution for mental retardation and there are no legal issues that they're facing, no criminal issues that they're facing.

Let me just say that the TOMM, it's called Test of Memory Malingering, is very simple consists of fifty line drawings of objects. You show those—and I've never used it but I've read the description of it. You show those things one at a time I assume on cards to a person and then you wait for a little while, fifteen minutes or so, and you come back and you show a picture of two objects, one of which the person has been exposed to and has seen and one which he hasn't. And all the person has to do is point to the one that he has seen before. And so there are fifty of these and it's forced choice. You have to pick A or B. So if a person is randomly responding, you would expect them to get twenty-five out of fifty. So if a person scores significantly lower than that, you assume that they are actively avoiding—that they knew which one had been shown and that they're pointing to the other one, which was the conclusion in this case.

But my point is that you can have an IQ in the range of mild mental retardation and still be bright enough to do that, still have enough intellectual ability to do that.

THE COURT: I assume then, Doctor, also someone who is in the mildly mentally retarded range would still be possibly capable of trying to manipulate things and manipulate people?

THE WITNESS: Yes, yes. And to, as a colleague of mine said, a dog can have fleas and ticks.

THE COURT: I understand.

THE WITNESS: But just because somebody is mentally retarded doesn't mean they can't also be malingering.

Q. (BY MR. TINDLE) Further, as to the adaptive scales, just so I make sure I've covered everything, how did your research into the defendant's ability to live on his own, what did you find in regards to that?

A. I found that he was significantly impaired in several areas of adaptive behavior, including impaired in his ability to function independently. And I've given the scores that he obtained on the Vineland. Do you want more from the interview with the sisters or my testing of him or examples or what?

Q. Give me examples first.

A. Well, one of the areas on the assessment is—let me get to that section--can he take medicine as directed, that is follow the directions on the label, and the answers to that were no by both sisters. Can he use a thermometer to take his own or another's temperature, no. Can he follow directions for health care procedures, no. Can he keep track of prescription or nonprescription medications and refill them as needed, no. Can he—let me say this is a graded series of tasks so what I'm starting at is the things that he can't do. There are a number of things that he could do but what he couldn't do is he couldn't clear the table completely. He couldn't use houeshold products correctly, couldn't prepare basic

foods that require cooking but don't need mixing. Could he clean one or more rooms other than his bedroom, no. And when he was asked to vacuum a room, he would vacuum a little spot in the middle and not the rest of it and it would have to be done after that. When he would wash dishes, he would wash the plates and leave pots and pans. These were given as examples of his deficits. When he would wash his clothes, he would throw the white and the colored clothes all in together and not be able to wash the clothes appropriately.

Also he kept everybody's telephone number and both times that I saw him he had the telephone numbers written down, he had a list of telephone numbers written, but he couldn't remember people's telephone numbers without looking at the paper.

Also, this is, I think, relevant to the issue of malingering. When I was asking him about what he could do, one of the questions I asked him was could he look at his watch and tell me what time it is. And he said I can tell time, I just can't read or write but I can tell time, so he was assertive in saying what he could do. And if he had been malingering that he is mentally retarded, I don't know why he would have offered to me what he could do. And it's not uncommon in people who are mildly mentally retarded or moderately mentally retarded, for that matter to make an effort to show what they can do. And he, in my opinion, throughout my evaluation was making an effort to show what he could do, at least at times.

. . .

Q. And you found no malingering in your examination of Alfonso Morris?

A. I think my conclusion was that he may have been malingering, but it's my conclusion that he was still mentally retarded.

Q. So he started out—

A. My evaluation was looking at everything and not just my interview with him, not just my testing.

Q. So your conclusion is that he may have been malingering but also that he started out mentally retarded, mildly mentally retarded?

A. That he is mentally retarded.

Appendix G

ALABAMA COURT OF CRIMINAL APPEALS

CR-02-1765

Alfonzo Morris
v.
State of Alabama

Appeal from Jefferson Circuit Court
(CC-97-5397)

Nov. 23, 2005.

Bryan A. Stevenson and Aaryn M. Urell, Montgomery, for appellant.

Troy King, atty. gen., and Margaret Mary (Missy) Fullmer, deputy atty. gen., and Jasper B. Roberts, Jr., asst. atty. gen., for appellee.

COBB, Judge.

Alfonzo Morris was convicted by a Jefferson County jury of two counts of capital murder for the death of Miriam Rochester; he was sentenced to death. The murder was made capital because it was committed during the course of a burglary, § 13A-5-40(a)(4), Ala.Code 1975, and because it was committed during the course of a robbery, § 13A-5-40(a)(2), Ala.Code 1975. The jury recommended by a vote of

10–2 that Morris be sentenced to death. The trial court adjudicated Morris guilty of both counts of capital murder and sentenced him to death. After Morris filed a motion for new trial, the trial court conducted a hearing and denied the motion. This appeal followed.

I.

The evidence presented at trial tended to show that 85-year-old Miriam Rochester was beaten to death in her home during the commission of a burglary and a robbery on the night of February 24, 1997. Earlier that evening, at approximately 9:00 p.m., the elderly woman who shared Rochester's house, Elizabeth Russell, had fainted and Rochester had summoned emergency medical assistance. One of the paramedics who responded to the call, Juanita Patterson, testified that, while she was inside the house assessing and caring for Russell, she received information from an ambulance attendant that caused her to go outside to check on her rescue vehicle. When Patterson walked outside, she saw a man later identified as Morris walking around the rescue vehicle. He was looking into the vehicle and he placed his hand on the vehicle's door, Patterson said. Patterson said that Morris walked toward her and asked her what was going on inside the house; he asked if someone had died and he began to walk around Patterson to enter the residence. Patterson told him that everything was under control and that he did not need to go inside. Morris told her that he knew everyone in the area and insisted that he had a right to enter the house. Patterson put her hands up

to prevent Morris from walking around her and into the house, and Morris became "somewhat belligerent and aggravated" and he raised his voice, Patterson said. (R. 297.) Patterson told Morris to leave the premises and informed him that she would call the police if he did not leave. She said that Morris turned and walked away, muttering to himself and calling her a "bitch." Patterson testified that she was very close to Morris while they had this conversation so she was able to see him clearly. She also testified that she smelled the odor of alcohol about him.

Medical personnel placed Russell in the ambulance so she could be transported to the hospital. Patterson testified that after she administered medical care to Russell in the ambulance and stepped outside so that the ambulance could drive away, she saw Morris standing at the rear of the ambulance. Patterson said that she and her partner told Morris that they had everything under control and that he needed to leave. Instead of leaving, Patterson testified, Morris peered into the ambulance and attempted to see who was inside; he told them that he wanted to know who was inside the ambulance. When the again told Morris he needed to leave, he walked away.

Rochester telephoned one of Russell's sons, Charles Russell, at approximately 9:30 p.m. and told him that his mother had fainted and had been transported to the hospital. Charles called his brother, Daniel, and asked him to check on their mother in the hospital. At approximately 10 p.m., Charles telephoned Rochester and told her that family members

were at the hospital with his mother. Daniel testified that, while he was visiting his mother in the hospital that evening, she asked him to go to the residence to be sure she had locked the back door When he got to residence at approximately 11:00 p.m., he became alarmed because the door to Russell's part of the house was open and the house appeared to have been ransacked. Daniel telephoned his brother from a neighbor's house; Daniel drove to Charles's residence and the two of them returned to Rochester's house.[1] Charles testified that he was frightened that the burglar might still be inside the house, so they returned to Charles's house and attempted to telephone Rochester. Rochester's telephone line was busy, so they contacted the police.

Daniel and Charles returned to Rochester's house. While they were waiting for the police to arrive, Daniel looked in the front window and he saw Rochester on the floor. They telephoned the police a second time, and emergency personnel arrived soon after. Birmingham police officer Eric Smith testified that he arrived at the scene at approximately 12:15 a.m. The house had been ransacked, he said, and he discovered Rochester on the floor with head wounds. Paramedic Juanita Patterson responded to the second emergency call at Rochester's residence on the night of February 24, 1997. Officer Smith testified that, when Patterson arrived at the scene, she "broke

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[1] Testimony at trial indicated that Rochester's house had been converted to a duplex, and that Russell used a back entrance to the house. (R. 199–200, 276.)

down" and she "lost it" completely. (R. 410.) Patterson's partner entered the house and confirmed that Rochester was deceased.

Patterson did not enter the house, but, at the request of a police officer, she looked inside the house. She told the officer that, when she had been inside the house for the earlier emergency call, Rochester's side of the house had been very neat and orderly. When she saw the house during the second call, items were scattered everywhere and lamps had been turned over. Patterson examined a photograph of the crime scene and testified that the rooms of the house had not been ransacked when she was there earlier that evening. Patterson told the police about her earlier encounter with Morris and she provided a description of him.

Officer Smith encountered Morris two blocks from the crime scene at approximately 5:00 a.m. Morris was staggering and appeared to be intoxicated, so Smith arrested him for public intoxication. While patting Morris down incident to the arrest, Smith discovered numerous items of costume jewelry, a cigarette, coins, and pills. Charles Russell later viewed the items of jewelry taken from Morris and he testified that he recognized many of the items because some belonged to his mother and some to Rochester.

Soon after Morris was arrested, Patterson was taken to a location in a police car and was asked if she could identify a suspect who stood outside the police car under bright lights. The suspect was Mor-

ris. She said she knew it was the person she had seen at Rochester's house, but she wanted to know if she could hear him speak. Before she completed her question to the police, Morris "began to talk and was fussing," and she knew from having seen him and having been in a confrontation with him earlier, that the man she saw under the bright lights was the man she had seen at Rochester's house. (R. 314.)

Detective Phillip Russell of the Birmingham Police Department's homicide unit testified that Officer Smith notified him that he had detained Morris for public intoxication and that Morris had items of jewelry belonging to Rochester in his possession. Russell stated that, when he saw Morris at the police department following his arrest, he determined that Morris was too intoxicated to be interrogated; Russell was afraid that Morris could not understand what Russell said to him, so he was placed in the city jail for 8 or 10 hours before he was interrogated. (R. 455.)

Further investigation revealed that Rochester's blood was on one of the shoes Morris was wearing when he was arrested. A cigarette in Morris's pocket at the time of his arrest was the same brand as the unsmoked cigarette found at the crime scene. The filter of the unsmoked cigarette recovered at the crime scene was found to contain Morris's DNA. The pathologist who performed the autopsy on Rochester determined that the 4-foot, 10-inch, 92-pound woman had sustained multiple lacerations to her head and two skull fractures, one of which was over 10 inches

long. The pathologist determined that blunt-force injuries to the head caused Rochester's death.

Morris did not present any evidence on his behalf. After deliberating for 59 minutes, the jury found Morris guilty of the two counts of capital murder for which he had been indicted. A sentencing hearing was conducted, and the jury, by a vote of 10–2, recommended that Morris receive the death sentence. Following a separate hearing before the trial court, the judge sentenced Morris to death. This appeal follows.

II.

In Issue VII of his brief to this Court, Morris argues that the trial court erred to reversal when it denied his request for a mental-health expert who could assist him in preparing and presenting a defense based on the expert's evaluation of his mental-health and mental-retardation issues. He argues in Issue II of his brief that the record establishes that he is mentally retarded and that *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), mandates a reversal of his death sentence. Because the facts and law relevant to the analysis of these issues are intertwined, we will discuss the issues together.

The procedural facts relevant to this issue are complicated and, therefore, are set forth in detail below.

Morris was arrested on the capital-murder charges on February 27, 1997, and he was indicted on November 7, 1997. Trial had been set for February 22, 1999. On February 10, 1999, defense counsel filed an amended plea, alleging that Morris was not guilty by reason of mental disease or defect; specifically, he alleged that Morris had been unable to appreciate the criminality of his actions at the time of the crime. Defense counsel further alleged that Morris was unable to assist counsel in the preparation of a defense. (C. 179.) Counsel also filed a motion for a psychiatric examination, seeking a determination of Morris's present competency and his mental state at the time of the offense. (C. 182–83.) In that motion, counsel alleged that Morris had a history of mental problems, that he had entered a plea of not guilty by reason of mental disease or defect, and that a mental examination was required to determine the validity of that defense. Also on February 10, 1999, counsel filed a motion for a continuance and alleged that Morris was in need of a psychiatric evaluation, which would not be completed by the trial date. (Supp. C. 41–42.)[2] On February 10, 1999, the trial court entered an order for an outpatient evaluation of Morris's competency to stand trial and his mental state at the time of the offense. (C. 71–73.) The order stated as grounds for questioning Morris's competency that Morris had a history of alcohol abuse and

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[2] A supplemental record was filed in this Court on November 26, 2003. Citations to that record will be designated "Supp. __," and will include the relevant page numbers in the clerk's record or in the transcript.

that he was heavily intoxicated on the date of the offense. (C. 71.) The trial court ordered Dr. Kimberly Ackerson, a certified forensic examiner who was under contract to the Alabama Department of Mental Health and Mental Retardation, to conduct the evaluation and to submit a report to the court and to the parties. (C. 2, 71–73, 2nd Supp. C. 47.)[3]

On June 28, 1999, the trial court received Dr. Ackerson's forensic evaluation report. (C. 4.) In the cover letter accompanying the report, Dr. Ackerson informed the trial court of the following:

> "As stated in the report, I am of the opinion that the defendant is presently unable to participate with his attorney in preparation of his defense and/or unable to understand the nature and gravity of the charge pending against him. In my opinion, his inability to serve in such role is secondary to life-long cognitive deficits.
>
> "As I believe this defendant to meet the requirement for mental retardation, I have referred his case to the Alabama Department of Mental Retardation for confirmation of the said diagnosis and to determine the services that this defendant may be eligible for, including competency training."

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[3] A second supplemental record was filed in this Court on December 10, 2003. Citations to that record will be designated "2nd Supp. __," and will include the relevant page numbers in the clerk's record or in the transcript.

(2nd Supp. C. 46.)

Dr. Ackerson's report indicates that her opinions and conclusions were derived from collateral data provided by the prosecutor's office, including a videotaped statement Morris gave on February 25, 1997;[4] Morris's school records; results from an intelligence test she administered; an interview with Morris; a form completed by defense counsel; a telephone conversation with Morris's sister; and medical records from the jail and from two hospitals where Morris had received treatment.

Dr. Ackerson reported that Morris's sister told her that their parents divorced when Morris was 9 years old, and that Morris did not cope well with the divorce. She further reported that Morris's sister told her that Morris "lost it" when their mother died in 1997. (2nd Supp. C. 50.) Dr. Ackerson reported that Morris had apparently never been able to live on his own. She reported that Morris had a family history of alcoholism. Dr. Ackerson reported that a review of Morris's school records revealed that he performed poorly in all core courses, that he was reported by his teachers to be a slow learner, and that he received "well below average" scores on a variety of achievement tests administered throughout his academic career. Morris's sister had told Dr. Ackerson that he received specialized educational services while he was in school. Dr. Ackerson reported that an intellec-

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[4] This videotape was not introduced at trial and it is not a part of the appellate record.

tual assessment performed in 1967, when Morris was 6 years old, revealed that his intellectual functioning was "well below average." (2nd Supp. C. 50.)

Dr. Ackerson reported that Morris had "a long and extensive history of substance abuse." (2nd Supp. C. 50.) Morris described his alcohol abuse as "out of control" and reported that he had a history of alcoholic blackouts. He acknowledged using various drugs daily, including marijuana, cocaine, heroin, and amphetamines. Dr. Ackerman reported that medical records revealed that Morris had been treated at a hospital for a severe injury he suffered when he put his arm through a window. His blood-alcohol level at the time of treatment for that injury was over .20. (2nd Supp. C. 51.)

Dr. Ackerson reported that, while Morris was incarcerated in the county jail, she requested that he be examined by a psychiatrist. In May 1999, the psychiatrist determined that Morris was depressed and that he perhaps had some paranoid thoughts; the psychiatrist ordered that Morris receive antipsychotic medication. A few weeks later, the psychiatrist discontinued that medication after finding that Morris was not mentally ill.

Dr. Ackerson's report indicated that she interviewed Morris on two occasions and that she administered the Wechsler Adult Intelligence Scale-III (WAIS-III). Morris appeared to put forth his best effort during testing, and he was generally cooperative during the interview sessions. Morris obtained a full-scale IQ score of 53 on the WAIS-III; that score is in

the moderate range of mental retardation and is well below the first percentile. (2nd Supp. C. 52.) In the portion of the report that presents the summary of the clinical assessment, Dr. Ackerson stated:

> "Based on the results of the current evaluation which included observation of Mr. Morris, his self-report, family report, and results of intellectual assessment, it is my opinion that he suffers from cognitive deficits that are primarily congenitally based but may have been further exacerbated by long-term substance abuse."

(2nd Supp. C. 52.) Dr. Ackerson stated that she was referring Morris's case to the Alabama Department of Mental Health and Mental Retardation for further evaluation and for treatment recommendations.

Dr. Ackerson evaluated Morris's competency to stand trial and she determined that his ability to understand the charges against him, to assist his attorney in his own defense, and to understand the legal process were very limited. She concluded that Morris did "not have sufficient knowledge to serve in the role of defendant" and that "his lack of knowledge is secondary to his below average intellectual functioning." (2nd Supp. C. 54.) She recommended that he receive competency training to "ascertain whether he could attain the necessary knowledge to serve in the role of a defendant." (2nd Supp. C. 60.)

Finally, Dr. Ackerson evaluated Morris's mental state at the time of the offense. She noted that, while Morris met the criteria for mental retardation at the

time of the offense, his cognitive deficits were not so severe that he was unable to understand the nature of his actions or the difference between right and wrong. She noted, too, that even though Morris was reported to be quite intoxicated before the crime, his actions on the night of the crime were deliberate and logical. (2nd Supp. C. 53.) Pursuant to Dr. Ackerman's recommendation, Morris was evaluated by Clyde Williams of the Department of Mental Health and Mental Retardation ("DMH/MR"). On July 14, 1999, Williams reported to Dr. Ackerman as follows:

> "Since a cognitive level of functioning falling within the Moderate range of mental retardation had recently been established by the results obtained from your administration of the WAIS-III, it was only necessary for me to assess Mr. Morris'[s] current level of adaptive functioning, and establish that cognitive and adaptive deficits existed during his developmental period. For these purposes I administered the AAMD Adaptive Behavior Scale (ABS). The overall score yielded by this instrument indicates that Mr. Morris'[s] current level of adaptive functioning also falls within the Moderate range of mental retardation; and reported historical information suggests that these deficits have been recognized in Mr. Morris since childhood.
>
> "These results, then, confirm a diagnosis of Mental Retardation and establish eligibility for services through DMH/MR."

(2nd Supp. C. 69.)

Williams further stated, "It is doubtful, in my opinion, that an individual accurately diagnosed with mental retardation can attain competency or contribute in any meaningful way in their own defense." (2nd Supp. C. 69.) Nonetheless, Williams stated that every effort would be made to accommodate the court's wishes, and he recommended that Morris complete a 4- to 6-week program of competency training.

On July 23, 1999, Dr. Ackerson filed an addendum to the forensic evaluation report with the trial court. (2nd Supp. C. 61-64.)[5] Dr. Ackerson reported the findings and recommendations Williams made based on his evaluation of Morris. Dr. Ackerson concluded:

> "Based on all the information available to me, Mr. Morris meets the criteria for a diagnosis of mental retardation, and he is eligible for services from the [DMH/MR]. In addition to subaverage intellectual functioning, Mr. Morris reportedly suffers from impairments in social skills and day-to-day living skills. He also has an extensive history of substance abuse. In my opinion, this defendant lacks sufficient knowledge with regard to serving in the role of a defendant and is in need of competency training. This opinion is also shared by Mr. Williams

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[5] The addendum was stamped filed on July 23, 1999. The docket entry indicates the addendum was filed on July 19, 1999. (2nd Supp. C. 4.) The four-day discrepancy is not relevant to our resolution of the issue presented.

from DMH/[MR] Region II-East Community Services."

(2nd Supp. C. 63.)

On November 15, 1999, the State filed a motion for a competency hearing and argued that "mild to moderate mental retardation in and of itself does not render the Defendant incompetent to stand trial." (C. 279–80.) The record does not reflect that a competency hearing was held. However, on December 13, 1999, as a result of Dr. Ackerson's diagnosis, the trial court ordered that Morris receive competency training. (C. 4.) A competency hearing was scheduled for August 7, 2000, but the record does not indicate that a hearing was held on that date. The record contains a notation dated August 29, 2000, that states, "It is ordered that Clyde Williams perform competency training on defendant Alfonso Morris." (C. 5.)

The next record notation regarding Morris's competency is dated February 21, 2001. On that date, the trial court entered an order finding Morris incompetent to stand trial and ordering Taylor Hardin Secure Medical Facility ("Taylor Hardin") to perform competency training beginning with three hour-long sessions each week. (C. 5, 283-86.) The court ordered Taylor Hardin to submit a written report to the court, the prosecutor, and defense counsel within 91 days of the initiation of treatment. The order further provided that, when Morris had attained "maximum improvement in courtroom knowledge and ability to assist his attorney in his defense," then Morris's competency to stand trial should be reevaluated by a psychiatrist or psychologist employed by Taylor Har-

din. (C. 285.) Criminal proceedings against Morris were continued until he was found to be competent to stand trial. (C. 286.)

On June 22, 2001, the court received a competency evaluation report from W. Wyatt Rhone, the patient educational coordinator for Taylor Hardin. Rhone stated that Morris attended six one-hour sessions of competency training in March 2001. Morris consistently told Rhone that he did not understand why he was incarcerated, claimed that the competency education confused him, and denied being able to remember any of the material on which he had been instructed. Rhone also reported that, during a casual conversation with Morris, Morris was able to provide details about a television program he had seen. Rhone stated, "My impression is that Mr. Alfonso Morris has a great deal of court knowledge but he was not going to reveal it to me." (C. 287.)

Competency hearings were then set for July 30, 2001, and October 15, 2001, but nothing in the record indicates that the hearings took place as scheduled. (C. 5.) On November 8, 2001, the State filed a motion requesting the trial court to order an "in-house" examination by experts at Taylor Hardin to determine Morris's competency, in accordance with the court's February 21, 2001, order. (C. 290–92.) The trial court granted the motion on November 28, 2001. On December 4, 2001, the trial court entered an order committing Morris to the custody of Taylor Hardin for a determination of his competency to stand trial and, if necessary, for treatment to attain competency. (C. 294–96.)

Morris was admitted at Taylor Hardin on December 19, 2001, and he was discharged on February 1, 2002. (2nd Supp. C. 76.) A copy of the forensic evaluation report completed by Dr. Kamal Nagi, a psychiatrist and certified forensic examiner, was filed with the trial court. (2nd Supp. C. 77-85.)[6] The report indicates that Morris was admitted to Taylor Hardin for treatment to restore him to competency and for a subsequent evaluation of his competence to stand trial. The report contained details of Morris's upbringing and educational history similar to the details documented in Dr. Ackerson's report. Dr. Nagi reported that Morris was in special-needs classes in school and that he began abusing drugs and alcohol at age 13, according to the report. Morris used marijuana, cocaine, heroin, and amphetamines, and he used them daily for two to three years before he was arrested. Morris drank at least a case of beer each day and reported to Dr. Nagi that he had experienced blackouts and possible seizures. (2nd Supp. C. 79–80.)

Dr. Nagi interviewed Morris twice, for a total of 4 hours and 50 minutes. Morris reported seeing shadows and hearing voices, but Dr. Nagi stated that Morris's report of hallucinations was inconsistent throughout his hospitalization. (2nd Supp. C. 81–82.)

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[6] The forensic evaluation report is dated January 31, 2002, but was stamped filed on October 28, 2002. (2nd Supp. C. 76.)

A psychological test, the TOMM,[7] was administered by a staff psychologist and, according to Dr. Nagi's report, the test indicated that Morris was exaggerating his memory impairment. Dr. Nagi reported that Morris "seems to be functioning in the borderline range" of intelligence and he stated that he believed that Morris was brighter than was indicated by Dr. Ackerson's IQ testing. (2nd Supp. C. 83.) Morris's competency to stand trial was assessed at Taylor Hardin. Morris consistently scored "0" on the competency assessment "in spite of the repeated efforts to educate him." (2nd Supp. C. 84.) Dr. Nagi reported that Morris's claimed inability to repeat simple words, to provide the name of his attorney, or to state the nature of the charges against him was inconsistent with his ability to recall details of visits he had had at Taylor Hardin and his request to a social worker that the social worker contact his sister using two telephone numbers he provided. Dr. Nagi concluded that Morris was malingering his lack of knowledge of the legal process and the charges against him. The examiner stated, "It was this examiner's opinion that he would be able to participate in legal proceedings if he chooses." (2nd Supp. C. 84.)

On July 26, 2002, the State filed a motion for a competency hearing. The competency hearing was continued several times and was eventually held on December 9, 2002. Dr. Nagi testified as the State's witness. He testified about examining Morris to de-

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[7] Only the abbreviation for this psychological test was given in the forensic report.

termine his competency to stand trial, pursuant to the trial court's order. Dr. Nagi testified that "Mr. Ron" had attempted to provide competency education to Morris, but Morris had appeared unwilling to cooperate and scored consistently at zero. (Supp. R. 9.) Dr. Nagi referred Morris to a psychologist at Taylor Hardin, who administered the TOMM. Dr. Nagi said he was unsure what "TOMM" stood for, but, he said, "The M stands for memory." (Supp. R. 9.) The test is used to detect malingerers, he said. Dr. Nagi testified that the psychologist reported to him that Morris was exaggerating his memory loss.

Dr. Nagi testified that during his first interview, Morris reported no hallucinations but that in the second interview, he did. Morris told Dr. Nagi that the voices in his head disappeared when he turned on the radio, when someone spoke to him, and when he ingested drugs; Dr. Nagi said that these reported symptoms did not "describe any functional disorder or mental illness." (Supp. R. 12.) He concluded, and he testified that "all my staff who worked with him all this time he was at the hospital" also concluded, that Morris was capable of assisting his attorney if he chose to do so.

On cross-examination, Dr. Nagi testified that he had diagnosed Morris with substance abuse and malingering. (Supp. R. 24.) He stated, "I know that he has a long history of substance abuse, can be intoxicated, and he can lose control of his temper, can lose control over everything, but after he sobers up," he can recall information, indicating that Morris "did not lose his mind completely" as a result of his drug

and alcohol abuse. (Supp. R. 26.) Dr. Nagi testified that he did not review Morris's school records. "School records don't mean anything. It's an academic achievement," he said. (Supp. R. 26.) Dr. Nagi testified that he disagreed with the opinions expressed by Dr. Ackerson and by Clyde Williams of the DMH/MR regarding Morris's mental retardation and incompetency. (Supp. R. 21, 27, 31.) Dr. Nagi testified, however, that he believed Morris was either of borderline intelligence or that he was mildly mentally retarded. (Supp. R. 32, 33.)

After Dr. Nagi testified, defense counsel requested funds to hire an independent mental-health expert to support the plea of not guilty by reason of mental disease or defect.[8] The trial court took the matter under advisement. In an order dated January 15, 2003, the trial court found Morris competent to stand trial and ordered that the case be set for trial. (C. 301.)

The case action summary indicates that the case was transferred to a different judge, who recused herself and then transferred the case to the judge who completed the proceedings. (C. 6.)[9] The judge sent a letter to defense counsel stating that the case had been set specially for trial on March 31, 2003,

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[8] It appears that counsel misspoke and referred to the plea as "not guilty by reason of mental disease and depression." (Supp. R. 39.)

[9] The initial transfer occurred because Judge James Garrett retired.

noting that the case was several years old and that the parties should expect trial to begin on that date. (C. 302.)

On February 12, 2003, defense counsel filed a motion for funds to hire a mental-health expert, stating that an expert was necessary to support the plea of not guilty by reason of mental disease or defect. (C. 303.) The trial court conducted a hearing on the motion on February 20, 2003. Defense counsel informed the court that Dr. Ackerson and Dr. Nagi had reached different conclusions about Morris's competency, and he argued that, in order for Morris to receive a fair trial and to support his special plea, Morris needed to be evaluated by an independent psychologist. (R. 14-15.) The trial court acknowledged that it had only recently "inherited" the case and questioned whether any of the mental-health experts had found that Morris was suffering from a mental disease. (R. 15.) The trial court stated that Dr. Ackerson had made only "a preliminary finding that possibly he may be in the low intelligence quotient that may prevent him from being competent to stand trial. And she recommended a full-blown evaluation at ... Taylor Hardin." (R. 16.) The court further stated that Morris was kept "for several months" at Taylor Hardin, where the staff conducted "a full-blown evaluation" and determined that Morris was malingering. (R. 16.) Defense counsel then argued that Morris was entitled to an evaluation by an independent expert, not one employed at a State facility, to determine whether he was suffering from a mental defect at the time of the offense. He stated that the previous evaluations had indicated, at the

very least, that it was possible that Morris suffered from such a mental defect. (R. 21.) The trial court responded that defense counsel could subpoena Dr. Ackerson to testify on his behalf. Defense counsel reasserted his desire for an independent expert and argued that even Dr. Ackerson had determined that Morris was not competent to stand trial. (R. 22.)

The trial court again stated that Dr. Ackerson's determination that Morris was incompetent to stand trial was only "the preliminary finding before there was a full-blown examination at Taylor Hardin." (R. 22.) The court stated that Dr. Ackerson had only recognized "a potential problem" and had stated that an examination at Taylor Hardin was necessary "to really make a determination whether her initial findings were correct." (R. 22.) The court further stated that a team of mental-health professionals at Taylor Hardin had evaluated Morris and that Dr. Nagi was not the only one who evaluated him and reached the final diagnosis. (R. 24–25.) Defense counsel argued that, because the mental health profession is an inexact science, Morris was entitled to an evaluation by an independent expert witness who could evaluate his mental state at the time of the crime so that he could receive the fair trial that he was constitutionally guaranteed. (R. 25–26.)

The trial court and the parties discussed *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). The trial court found *Ake* distinguishable from Morris's case because, it said, the judgment in *Ake* was reversed because no mental-health expert had evaluated the defendant's mental state at the

time of the offense, whereas Morris had had two evaluations at the taxpayer's expense. The court noted that both of the mental-health experts were available to the defense by subpoena. (R. 26–29.) Defense counsel argued that he was entitled to an independent expert, one not hired by the State. The court countered that, even though Dr. Nagi was employed by the State, he was an independent professional and was not biased. (R. 29–30.) Finally, defense counsel stated again that the denial of an independent expert would result in an unfair trial. (R. 30.) On February 26, 2003, the trial court denied the defense motion for funds to hire a mental-health expert. (C. 8.)

On February 28, 2003, the State filed a motion in limine seeking an order preventing Morris from presenting evidence of the IQ score of 53 as determined by Dr. Ackerson, because, it said, the evidence was not relevant to Morris's insanity defense because it did not establish that he suffered from a mental disease or defect preventing him from appreciating the nature and quality or wrongfulness of his acts, § 13A-3-1(a), Ala.Code 1975. (C. 320-24.) On March 18, 2003, the trial court held a hearing on the motion. Defense counsel argued that any denial of his right to present his insanity defense would violate his constitutional right to due process. The trial court asked, "Do you have an expert witness that's going to say that he suffered from some mental defect or disease?" (R. 48.) Defense counsel stated that they had subpoenaed Dr. Ackerson when she initially filed her report and further stated that he believed that anytime a person's mental capacity is in question, the ability to form the specific intent to commit the crime

of capital murder is necessarily an issue. The trial court noted that "the full-blown examination of this defendant says he's malingering and faking it" and that no expert had testified that Morris had a mental disease or defect. (R. 49.) The court stated that its inclination was to grant the State's motion because the testimony about Morris's IQ was not relevant to insanity, but it deferred ruling on the motion until trial. The court acknowledged that the evidence might be relevant as mitigation at the penalty phase if the jury found Morris guilty of capital murder.

The case proceeded to trial on March 31, 2003. Before voir dire was conducted, Morris withdrew his plea of not guilty by reason of mental disease or defect. (R. 61.) The court stated that Dr. Ackerson's findings would not be admissible in the guilt phase but that they might be admissible in the penalty phase. (R. 61–62.)

After the jury had rendered its verdict in the guilt phase and before the penalty phase of the trial began, defense counsel presented the testimony of Dr. Ackerson outside the presence of the jury "so the appellate court doesn't think we weren't doing our job in calling Dr. Ackerson as a witness in front of jury" because Dr. Ackerson's opinion had changed and that change "would hurt our client if we put this witness on the stand in front of the jury." (R. 651.) Dr. Ackerson testified as to her 1999 assessment in which she diagnosed Morris's mental retardation and noted his substance abuse and memory impairment. She testified that Morris had been committed to Taylor Hardin for competency training and that the staff

at Taylor Hardin determined that Morris was malingering.

Dr. Ackerson testified that she "was provided the opportunity to review letters *that I was told were written by the defendant.*" (R. 654; emphasis added.) She stated that the letters were not consistent with the level of intellectual functioning demonstrated during her evaluation, "because someone with that level could not have written the type and style of letters that I was provided to review." (R. 654.) The State presented Dr. Ackerson with State's Exhibits 86, 87, and 88, which are court documents and handwritten letters in Morris's state and federal court files. Dr. Ackerson testified that her review of those documents and the Taylor Hardin report had caused her to change her opinion about Morris's cognitive abilities. The prosecutor asked Dr. Ackerson whether she had assumed the documents had been written by Morris, and she replied, "Right. I did ask you specifically–that I was going to make my opinion based on the assumption that these were written and produced by the defendant, right." (R. 657.) The court asked whether the pleadings were signed by Morris, and the prosecutor stated that the pleadings were signed by Morris and that the State's expert would testify "they are signed by the defendant." (R. 657.)

The prosecutor then stated that Wyatt Rhone, the patient educational coordinator from Taylor Hardin who worked with Morris, was prepared to testify. The trial court suggested the prosecutor was "beating a dead horse" with this "non-issue." (R. 658.) The prosecutor explained that, before trial, when the

State made its motion in limine seeking to exclude Dr. Ackerson's findings regarding Morris's mental retardation, it was suggested that Morris could introduce the evidence at the penalty phase. The prosecutor stated that the State was now "just keeping it out of the penalty phase." (R. 659.) The prosecutor then stated for the record that Rhone would testify that he had conducted 400 to 500 competency assessments, that Morris had scored a "0," and that he had seen a score of "0" on only 10 other occasions. (R. 660.)

The penalty phase of the trial was then held. No evidence was presented as to Morris's level of intellectual functioning. The jury recommended that Morris receive the death sentence, and the trial court imposed the death sentence. In its sentencing order, the trial court did not find any mitigating circumstances related to Morris's mental health or intellectual functioning.

The procedural facts that occurred before and during trial have been set forth in detail because they are complex and because the detailed background information is necessary to the understanding of our holding. For the reasons expressed below, we conclude that the trial court erred to reversal when it denied Morris's request for funds to hire an independent mental-health expert.

A. *Ake v. Oklahoma*

The United States Supreme Court, in *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84

L.Ed.2d 53 (1985), held that, when an indigent defendant makes a preliminary showing that his mental condition at the time of the offense is likely to be a significant factor at trial, due process requires that, at a minimum, a state provide access to a competent psychiatrist who will evaluate the defendant "and assist in evaluation, preparation, and presentation of the defense" at the guilt phase and at sentencing. The Court began its analysis by stating, "This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." 470 U.S. at 76, 105 S.Ct. 1087. "[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." 470 U.S. at 77, 105 S.Ct. 1087.

The Court stated that three factors are relevant to determining "whether, and under what conditions, the participation of a psychiatrist is important enough to preparation of a defense to require the State to provide an indigent defendant with access to competent psychiatric assistance in preparing the defense." *Id.* The three factors are the private interest affected by the State's action, the governmental interest that would be affected if the expert were provided, and the probable value of the psychiatric assistance versus the risk of error in the proceeding if the assistance is denied. The Court observed as to the first factor, "The private interest in the accuracy of a criminal proceeding that places an individual's

life or liberty at risk is almost uniquely compelling." 407 U.S. at 78, 92 S.Ct. 1983. The Court stated that the individual's interest in the State's attempt to convict him weighed heavily in the analysis. As to the second factor, the Court could identify only the State's financial interest weighing against the provision of a psychiatrist, and it found that interest to be insubstantial. The Court found that the State could "not legitimately assert an interest in the maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained." 470 U.S. at 79, 105 S.Ct. 1087. As to the third factor, the Court noted, initially, that psychiatric assistance had come to play a pivotal role in criminal proceedings. It noted that a majority of states and the federal government had decided that, in certain circumstances, an indigent defendant was entitled to psychiatric assistance to secure an adequate defense. The Court recognized the extensive tasks that psychiatrists had come to complete at criminal trials:

> "[W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's

> mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the 'elusive and often deceptive' symptoms of insanity, *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense."

470 U.S. at 80–81, 105 S.Ct. 1087.

Additionally, the Court noted:

> "By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that

private individuals do as well, when they can afford to do so. In so saying, we neither approve nor disapprove the widespread reliance on psychiatrists but instead recognize the unfairness of a contrary holding in light of evolving practice."

470 U.S. at 81--82, 105 S.Ct. 1087 (footnote omitted).

Following its discussion of the pivotal role played by psychiatrists at criminal trials, quoted above, the Court stated:

"*The foregoing leads inexorably to the conclusion that, without the assistance of a psychiatrist* to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a State's psychiatric witnesses, *the risk of an inaccurate resolution of sanity issues is extremely high.* With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination."

470 U.S. at 82, 105 S.Ct. 1087 (emphasis added).

Noting that the risk of error from the denial of psychiatric assistance was highest when the defendant's mental condition was seriously in question, the Court recognized that "a defense may be devastated by the absence of a psychiatric examination and testimony." 470 U.S. at 83, 105 S.Ct. 1087. The Court then detailed the relevant factors in Ake's

case, including that Ake's sole defense had been insanity, that he had been found incompetent to stand trial and had been committed for treatment, that psychiatrists who had examined him for competency suggested that Ake's mental illness might have begun years earlier, and that state law recognized an insanity defense and placed the initial burden of producing evidence on the defendant. 470 U.S. at 86, 105 S.Ct. 1087. These factors led the Court to conclude that Ake's mental state at the time of the offense was a substantial factor in his defense and, therefore, that the trial court's denial of his request for the assistance of a psychiatrist deprived Ake of due process. The Court also noted that, because psychiatric testimony about Ake's future dangerousness was an issue at sentencing, denying Ake a psychiatrist to assist him with his defense as to that issue also constituted a due-process deprivation.

B. *Trial court's application of Ake v. Oklahoma*

The record reflects that Morris's case was assigned to the judge who tried the case only after the judge to whom it had been assigned and who had presided over the years of pretrial proceedings related to Morris's incompetency retired and after a second judge recused herself from the case. The newly assigned judge apparently misunderstood the proceedings and evaluations that had taken place before the case was assigned to him. This series of misunderstandings related to the competency proceedings and the court's misapplication of the principles of *Ake v. Oklahoma* resulted in a denial of Morris's due-process rights.

At the February 20, 2003, hearing on the motion for expenses to hire an independent psychologist or psychiatrist-the first hearing the trial judge held after the case was transferred to him-the court repeatedly stated that Dr. Ackerson had conducted only a "preliminary" evaluation of Morris and that Taylor Hardin staff members had conducted a "full blown evaluation" of Morris. Both assertions are inaccurate, and significantly so. Dr. Ackerson was appointed by the court to assess Morris's competency to stand trial and his mental state at the time of the offense; she evaluated Morris and submitted her report to the court. Based on her finding that Morris was functioning in the moderate range of mental retardation, Dr. Ackerson referred Morris to DMH/MR so that staff members there could confirm the diagnosis and provide treatment recommendations. Clyde Williams of DMH/MR evaluated Morris's adaptive functioning and confirmed Dr. Ackerson's diagnosis that Morris's mental retardation was in the moderate range and had been recognized since childhood. Nothing in these reports suggests that Dr. Ackerson's evaluation and diagnosis were preliminary.

To the contrary, the trial court's initial order that Morris receive competency training was based solely on Dr. Ackerson's diagnosis. (C. 4.) Based on Dr. Ackerson's diagnosis that Morris's full-scale IQ score was 53 and her recommendation that Morris receive competency training, the trial court later found Morris incompetent to stand trial and ordered DMH/MR to provide additional competency training to Morris. (C. 283–286.) Furthermore, the *only* IQ

score in the record before us is the one obtained and reported by Dr. Ackerson in 1999.[10]

At the February 20, 2003, hearing, the trial court mistakenly stated that, following Dr. Ackerson's "preliminary investigation," the court had "ordered [Morris] to Taylor Hardin for a full-blown examination." (R. 17.) Again, the trial court was mistaken. The record clearly reflects that Morris was committed to Taylor Hardin in 2001 only for the purpose of receiving competency training and a competency evaluation. (C. 5, 78, 294.) Dr. Nagi's forensic evaluation report states that Morris was admitted to Taylor Hardin "for treatment of an incompetent defendant to be restored to competence and subsequent evaluation of his competence to stand trial...." (C. 78.) The only psychological test administered at Taylor Hardin, according to Dr. Nagi, was the TOMM; Dr. Nagi did not know what the initials of the test were an acronym for, but he stated that it was a memory test and a test to assist in determining whether the taker was malingering.[11] Thus, the trial court incorrectly

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[10] Dr. Nagi testified at the December 9, 2002, competency hearing that he believed Morris was only mildly mentally retarded or was perhaps of borderline intelligence, but he provided no testimony or report of another IQ score. (Supp. R. 32, 33.)

[11] In the "Data Sources" section of Dr. Nagi's report, Dr. Nagi listed medical records from Taylor Hardin, including "recent" physical and mental examinations. (2nd Supp. C. 79.) However, Dr. Nagi did not state when the evaluations purportedly occurred, nor did he refer to any of the results obtained. His testimony at the competency hearing appeared to be based on his (continued...)

believed that Morris had received a "full blown" evaluation at Taylor Hardin; Dr. Ackerson had conducted only a "preliminary investigation." Neither of the court's assumptions about the evaluations was correct.

Even if Dr. Ackerson had performed only a preliminary evaluation and had made only a preliminary diagnosis that Morris was functioning in the moderate range of mental retardation, however, and even if Taylor Hardin had performed a complete evaluation to determine Morris's competency at the time of trial and his mental state at the time of the offense, Morris would have been entitled under due-process principles to the appointment of an independent mental-health professional to assist him in his defense. To the extent the trial court believed that mental-health evaluations performed for the court, the results of which were made available to the parties, always satisfied due-process requirements, the trial court misunderstood the holding of *Ake v. Oklahoma.*

As the Supreme Court made clear in the portions of *Ake* quoted above in this opinion, when an indigent defendant makes a preliminary showing that his mental health is likely to be a significant factor at trial, due process requires that the State provide access to a psychiatrist's assistance. Morris was entitled to "the assistance of a psychiatrist to conduct a

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interviews, the results of the TOMM, and the reports of staff members who observed Morris on the ward.

professional examination *on issues relevant to the defense,* to help determine whether the insanity defense is viable, to present testimony, and *to assist in preparing the cross-examination of the State's psychiatric witnesses.*" *Ake v. Oklahoma,* 470 U.S. at 82, 105 S.Ct. 1087 (emphasis added). The trial court apparently believed that the evaluations by Dr. Ackerson and Taylor Hardin satisfied the *Ake* requirements. We disagree. The fundamental holding of *Ake* involved a defendant's receiving assistance from an independent expert who could "assist in evaluation, preparation, and presentation of a defense." 470 U.S. at 83, 105 S.Ct. 1087. Dr. Ackerson's and Dr. Nagi's evaluations were conducted at the court's request, and the reports of the evaluations were submitted to the court and to both parties. In no sense did these evaluations satisfy the intent expressed by the Supreme Court in *Ake.*

To the extent that the trial court believed that Dr. Nagi was a neutral expert and that, therefore, *Ake* was satisfied, we disagree. As noted above, the Supreme Court made it clear that, once an indigent defendant had established that his sanity was likely to be a significant issue at trial, he is entitled to an independent expert—an expert devoted to assisting his defense and one who is not providing the same information or advice to the court and to the prosecution. One of the most crucial decisions a defense expert can provide assistance with is whether a mental-health defense is viable and, if so, how best to present it to the jury. Certainly, it is unreasonable to expect that a neutral expert who reports to the court and to the parties would provide the same degree of

assistance to a defendant as could be expected from the defendant's own independent expert. The Supreme Court in *Ake* stated:

> "Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. *Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party.* When jurors make this determination about issues that inevitably are complex and foreign, *the testimony of psychiatrists can be crucial and a 'virtual necessity if an insanity plea is to have any chance of success.'* By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them. It is for this reason that States rely on psychiatrists as examiners, consultants, and witnesses, and that private individuals do as well, when they can afford to do so."

470 U.S. at 81–82, 105 S.Ct. 1087 (footnotes omitted) (emphasis added).

In *Smith v. McCormick,* 914 F.2d 1153 (9th Cir. 1990), the defendant objected when the trial court ordered a psychiatrist to examine him and to submit the report to the court; he had requested the assistance of an independent psychiatrist to assist him in preparing his mitigation case at his capital-sentencing hearing. The trial court denied the defense requests for an independent expert and the United States Court of Appeals for the Ninth Circuit reversed. The Court stated:

> "The right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate-including to decide, with the psychiatrist's assistance, not to present to the court particular claims of mental impairment."

914 F.2d at 1157.

Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991), lends additional support to Morris's claim that the trial court's ruling resulted in a denial of his due-process rights. In *Cowley,* defense counsel requested psychiatric assistance and a mental-health evaluation based on Cowley's bizarre behavior. Before allowing the motion, the trial court ordered that Cowley be evaluated at a local mental-health center. The psychiatrist who evaluated Cowley reported to the court and the parties that Cowley was competent to stand trial and that he had been responsible for his actions at the time of the offense. The trial court de-

nied defense counsel's repeated motions for assistance from a mental health professional, even though the record contained evidence indicating that Cowley had been institutionalized repeatedly for mental problems and that he was taking antipsychotic medication. On appeal from the denial of petition for federal habeas relief, the United States Court of Appeals for the Eleventh Circuit held that, even though there had been some evidence indicating that Cowley was sane, there was ample evidence indicating that he was not and that Cowley had been entitled to the assistance of his own expert. The fact that the court's expert, Dr. Habeeb, had been "independent," was not sufficient to satisfy *Ake,* the Court held:

"The district court found that Dr. Habeeb was a 'qualified,' 'independent psychiatrist.' This may have been the case, but Dr. Habeeb did not provide the constitutionally requisite assistance to Cowley's defense. *Ake* holds that psychiatric assistance must be made available for the *defense.* This assistance may include conducting 'a professional examination on issues relevant to the defense,' presenting testimony, and assisting 'in preparing the cross-examination of a State's psychiatric witnesses.' Dr. Habeeb performed none of these essential tasks on Cowley's behalf. Dr. Habeeb was called by the prosecution and testified against Cowley at both the competency hearing and the trial. His testimony was that he had examined Cowley and found him to be competent and that Cowley showed no signs of schizophrenia or other evidence of insanity at the time of the crime. Dr. Habeeb did not assist in Cowley's trial preparation and obviously could

> not have assisted Cowley in his own cross-examination."

929 F.2d at 644 (quoting *Ake*) (footnote omitted). After noting that, in Alabama, the law places the burden of proof on the defendant, the Court stated, "It was impossible for Cowley to meet this heavy burden, but not because he was insufficiently disturbed. The state of Alabama made it impossible for Cowley to meet this burden by refusing to provide an independent mental health professional who could evaluate Cowley's sanity at the time of the assault." 929 F.2d at 645.

We agree with the rationale expressed in the foregoing cases. We hold that, even if Morris had received a "full blown" psychiatric evaluation at Taylor Hardin, that evaluation would not have satisfied the requirements of *Ake*. Moreover, the record indicates that Morris did not receive a "full blown" psychiatric evaluation at Taylor Hardin because the scope of the trial court's order was far more limited; Morris was sent to Taylor Hardin to receive competency training and a reevaluation, and the results of that evaluation were reported directly to the court. In no sense did this satisfy the requirements of *Ake*. We note, furthermore, that the two experts who had evaluated Morris and reported to the court had reached inconsistent results. Especially in light of this inconsistency between the two experts, due process required the appointment of an independent mental-health expert to assist Morris. Only with the assistance of a defense expert would Morris have been able to reconcile the inconsistent results, determine whether a

mental health defense was viable and, if so, how to present it effectively, and how to effectively cross-examine the State's expert witnesses. Thus, the examination by Dr. Nagi did not satisfy the requirements of fundamental due process.[12]

When the trial court denied Morris's motion for funds to hire an independent expert, the trial court stated that Morris could subpoena Dr. Ackerson if his defense was that his intelligence was so low that he did not appreciate the criminality of his conduct at the time of the crime. (R. 21.) That Morris could have subpoenaed one of the mental-health experts who had already submitted her report and her conclusions to the trial court and to both parties in no way satisfied the due-process requirements in *Ake*. For the reasons stated in *Smith v. McCormick*, 914 F.2d 1153 (9th Cir. 1990), and in *Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991), discussed above, Dr. Ackerson was not acting as an independent expert on Morris's behalf and her availability by subpoena in no way satisfied the dictates of *Ake*. *See Starr v.*

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[12] Morris argued at the hearing on the motion for funds to hire a mental-health expert that Dr. Nagi was not independent and that he was, essentially, the State's expert. (R. 29.) The trial court disagreed. While we need not resolve this issue in order to determine that Morris was entitled to an expert to assist his defense, we note that the Alabama Supreme Court has stated, "[T]he trial court ordered that the defendant be transferred to the Taylor Hardin Secure Medical Facility *for examination by State experts*. The records generated by the Taylor Hardin staff were made available to the defendant's State-paid expert." *Ex parte Wilson*, 571 So.2d 1251, 1257 (Ala. 1990).

Lockhart, 23 F.3d 1280, 1289 (8th Cir. 1994) ("We also find the trial court's alternative finding, that Starr's due process right to expert assistance was satisfied by the court-ordered examination and by the defense's ability to subpoena the state examiners, to be erroneous on two grounds. First, the examination was not appropriate to Starr's needs. Second, *the ability to subpoena a state examiner and to question that person on the stand does not amount to the expert assistance required by Ake.*" (emphasis added)).

When the trial judge denied Morris's request for funds to hire an independent psychologist, the facts were: that from February 1999 until January 2003 Morris's competency to stand trial was under investigation; that from February 2001 until January 2003, Morris had been declared by the trial court to be incompetent to stand trial; that the only full-scale IQ score reported in the record for Morris is 53, which is a score ranking "well below the first percentile" of the population (2nd Supp. C. 52); that the court's experts disagreed about Morris's IQ and his competency to stand trial; and that Morris had a substantial history of substance abuse and blackouts and was so intoxicated at the time of his arrest, a few hours after the murder, that the detective did not question Morris about the crime because he feared that Morris would not be able to understand everything the detective said to him. In spite of all of the foregoing evidence, the trial court denied funds for an independent mental-health expert, which resulted in Morris's withdrawing his mental-health defense. In fact, Morris presented no defense during the guilt

phase of his trial. Furthermore, based in part on the prosecutor's representations that Morris had *signed* certain letters and pleadings that were shown to her, Dr. Ackerson determined that Morris was not retarded. As a result of Dr. Ackerson's new testimony, defense counsel did not introduce Morris's IQ score of 53 into evidence at the penalty phase of the trial. The trial court found no mitigating factors, statutory or nonstatutory, relating to Morris's mental health to exist when it sentenced Morris to death.

The facts presented here illustrate precisely the type of case the *Ake* Court contemplated when it stated:

> "'The risk of error from denial of such assistance, as well as its probable value, is most predictably at its height when the defendant's mental condition is seriously in question. ... It is in such cases that a defense may be devastated by the absence of a psychiatric examination and testimony; with such assistance, the defendant might have a reasonable chance of success."

Ake v. Oklahoma, 470 U.S. at 82–83, 105 S.Ct. 1087.

The record established that Morris's mental condition was seriously in question and was a substantial factor in his defense at the guilt phase and at the penalty phase of his trial. Morris was entitled to the assistance of an independent mental-health expert. The trial court's denial of the necessary assistance

deprived Morris of due process and requires a reversal for a new trial.[13]

C. *Error under Atkins v. Virginia, 536 U.S. 304 (2002)*

Although the trial court's erroneous denial of Morris's request for funds for an independent mental-health expert mandates a reversal for a new trial, we note, additionally, that the evidence in the record currently before us reflects that a mental-health expert was vital to Morris's case in the sentencing phase as well as at the guilt phase.

In *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), the United State Supreme Court held that execution of a mentally retarded defendant constitutes cruel and unusual punishment. The Court in *Atkins* did not establish guidelines for determining what a defendant must demonstrate in support of a claim of mental retardation nor has the Alabama Legislature done so. In *Ex parte Perkins,* 851 So.2d 453 (Ala. 2002), the Alabama Supreme Court held that, to establish that he is mentally retarded, a defendant must prove that he has an IQ of 70 or below, that he has significant deficits in adaptive functioning, and that the deficits manifested themselves during the developmental period.

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[13] We are aware of the recent decision of the Alabama Supreme Court in *Ex parte E.J.M.,* 928 So.2d 1081 (Ala. 2005). That case is, however, distinguishable because it involved the rights of a juvenile at a transfer hearing.

In *Morrow v. State*, 928 So.2d 315 (Ala.Crim.App. 2004), this Court suggested a procedure for determining whether a defendant was mentally retarded and, therefore, was ineligible for the death penalty. In *Morrow*, we specifically encouraged "trial courts to resolve [ ] mental-retardation issues before trial if at all possible in order to avoid the burden and expense of a bifurcated capital trial." 928 So.2d at 324. The record in this case demonstrates the rationale for that recommendation. At the conclusion of the February 20, 2003, hearing on Morris's motion for funds to hire a mental-health expert, all of the evidence and testimony in the record at that point indicated that Morris might be mentally retarded. Dr. Ackerson had reported that Morris obtained a full-scale IQ of 53, which is in the "moderately mentally retarded" classification. Although Dr. Nagi testified at the December 9, 2002, competency hearing that he disagreed with Dr. Ackerson's opinion that Morris was moderately mentally retarded and he disagreed with the opinion of DMH/MR that Morris was moderately mentally retarded and suffered from longstanding deficits in adaptive functioning, Dr. Nagi twice testified that Morris might be mildly mentally retarded. (Supp. R. 32, 33.)[14] The conflict in the testimony of the court's experts on this issue, alone, necessitated the appointment of a mental-health expert who could assist Morris in the preparation and presentation of his claim of mental retardation. Instead,

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[14] The State's brief quotes Dr. Nagi's testimony indicating that Morris could be mildly mentally retarded. (State's brief at 20.)

the case proceeded to trial and Morris was unable to develop the claim at all.

In spite of the conflict in the testimony, the State argues in its brief and claimed at oral argument before this Court that certain pleadings and letters in the record were "written by Morris," and that they establish that Morris could not be mentally retarded. The record, however, contains no proof that Morris *wrote* any of the pleadings or documents on which the State relies to refute the diagnosis of mental retardation.

The record reflects that, some time before the sentencing hearing, the prosecutor apparently presented Dr. Ackerson with the pro se, handwritten pleadings and the handwritten letters now contained in the record and he told Dr. Ackerson that Morris had written them. During the hearing held outside the jury's presence and before the sentencing hearing, Dr. Ackerson testified, under cross-examination by the prosecutor, that she assumed the items had been authored by Morris. She answered the prosecutor's question on this issue by stating, "I did ask you specifically—that I was going to make my opinion based on the assumption that these were written and produced by the defendant, right." (R. 657.) The prosecutor then made a proffer to the court that the State's handwriting "expert would testify they are *signed by* the defendant." (R. 657; emphasis added.) Based on her review of documents she had been told Morris had written and on her review of Dr. Nagi's report, Dr. Ackerson testified that the letters indicated that Morris had exaggerated his intellectual

deficits during her evaluation of him, because someone in the moderate range of mental retardation could not have written the types of letters she was provided to review. (R. 654.)

The record does not support the State's assertion, which it made before trial to Dr. Ackerson and during trial to the court and which it continues to make on appeal, that Morris *wrote* the documents. The State proffered only that its expert would testify that he had *signed* them. This Court is well aware that pro se documents are frequently written by "jail house lawyers" on behalf of defendants who then sign their names on the documents. And yet it was this unsubstantiated assertion that led Dr. Ackerson to change her opinion about Morris's cognitive functioning. Because Morris had no independent mental-health expert of his own, Dr. Ackerson's change of opinion eviscerated his mental-retardation claim, and Morris did not present any testimony about his mental retardation at sentencing. This, the State noted before sentencing, had been its purpose. (R. 659.)[15]

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[15] Even if we had not found reversible error under *Ake* based on the trial court's denial of Morris's request for funds to hire a mental-health expert to assist him in presenting his defense at the guilt phase, we would have found, nonetheless, that the case would have to have been remanded for a hearing pursuant to *Atkins* to determine whether Morris was mentally retarded.

Conclusion

The failure to grant Morris funds to hire an independent mental-health expert left him with no defense at the guilt phase of trial. Even though Morris had been declared incompetent by the trial court following a forensic evaluation that determined Morris had a full-scale IQ of 53, even though DMH/MR found that Morris had lifelong cognitive and adaptive deficits, even though Morris had a documented history of extensive substance abuse and was extremely intoxicated on the night of the murder, and even though Morris was treated with antipsychotic medication while he was at Taylor Hardin, he was forced to proceed to trial and was convicted and sentenced to death without the assistance of an independent mental-health expert. This denial has violated Morris's fundamental due-process rights and the Supreme Court's holdings in *Ake v. Oklahoma* and *Atkins v. Virginia.*

While we are mindful of the fact that this case began with the 1997 murder of Miriam Rochester and that our reversal today of Morris's convictions will further lengthen the time before this case is finally resolved, we cannot ignore a denial of constitutional due-process rights that deprived Morris of the fair trial which he was due. Moreover, we are convinced that this case would not withstand the many levels of review in State and federal proceedings that would follow an affirmance by this Court.

For all of the reasons discussed above, we are compelled to reverse the convictions and sentence of death and remand the cause for further proceedings.

REVERSED AND REMANDED.

BASCHAB and WISE, JJ., concur.

SHAW, J., dissents, with opinion, which McMILLAN, P.J., joins.

SHAW, Judge, dissenting.

I believe that this case should be remanded for a hearing pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); however, given the present posture of this case, I would not reverse Morris's convictions and sentence.

Although in Issue VII of his initial brief Morris begins with a broad and general argument that he was entitled to a "mental health professional" (Morris's brief at p. 39), the only specific argument Morris makes regarding his mental health is that he was entitled to an independent expert on mental retardation because what he claims were state experts could not "consult with the defense and plan a strategy for presenting the evidence of Mr. Morris's mental retardation *at sentencing*." (Morris's brief at p. 43; emphasis added.) A fair reading of Morris's initial and reply briefs reveals, in my view, that he is not arguing on appeal that he was entitled to any expert assistance with relation to the guilt phase of his trial. However, as the majority notes, the only request

Morris made for expert assistance at trial was to assist him in presenting his defense of mental disease or defect at the guilt phase of his trial. Therefore, I believe that the majority's reversal in this case is based on plain error. However, given the state of the record regarding Morris's alleged mental retardation, I believe it would be better to remand this case for a hearing to determine the constitutionality of Morris's death sentence under *Atkins* before reversing two capital convictions stemming from an eight-year-old murder on an issue that is not raised and is being noticed by this Court under the plain-error doctrine and that, if the trial court determines that Morris's death sentence is unconstitutional under *Atkins*, this Court would not reach under the general rules of preservation and waiver.

I also point out that the majority's reversal in this case appears to be based, at least in part, on the ground that Morris was entitled to an independent mental-health expert to assist him in presenting evidence of his mental retardation *at the guilt phase* of the trial. Whether mental retardation is a defense to a crime in Alabama appears to be an issue of first impression. Such an issue raises in my mind many questions, including the following: (1) Can mental retardation be so severe as to constitute a mental disease or defect under § 13A-3-1, Ala.Code 1975, and provide a complete defense to a criminal charge? and (2) If mental retardation is not a mental disease or defect under § 13A-3-1, would evidence of mental retardation nevertheless be admissible to the extent that it could render a defendant unable to form a specific intent, similar to the admissibility of evi-

dence of voluntary intoxication under § 13A-3-2(a), Ala.Code 1975, and thereby provide a partial defense, in light of Alabama's express repudiation of the diminished-capacity defense?[16] See, e.g., § 13A-3-1(a), Ala.Code 1975 (except as defined, "[m]ental disease or defect does not otherwise constitute a defense"); *McGowan v. State,* [Ms. CR-95-1775, December 12, 2003] __ So.2d __, __ (Ala.Crim.App. 2003) ("Alabama has expressly rejected the doctrine of diminished capacity.") See also *Barnett v. State,* 540 So.2d 810 (Ala.Crim.App. 1988) (rejecting the appellant's claim that his mental defect, even if it did not rise to the level of insanity under § 13A-3-1, entitled him to a jury instruction on a lesser-included offense because it was analogous to intoxication and rendered him incapable of forming specific intent because, the Court held, his mental defect, if it did not amount to insanity, was merely a diminished-capacity defense not recognized under Alabama law).

The majority does not address these questions; although the majority's holding implies that it believes mental retardation may be a defense to a crime,[17] it does not state whether it believes mental

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[16] Voluntary intoxication is not a defense to a crime, and because diminished capacity is not recognized in Alabama, the level of intoxication necessary to negate specific intent must rise to the level of insanity under § 13A-3-1. See *Ex parte Bankhead,* 585 So.2d 112, 121 (Ala. 1991) ("The degree of intoxication necessary to negate specific intent and, thus, reduce the charge, must amount to insanity.").

[17] I note that despite holding that Morris was entitled to funds to hire an independent mental-health expert, at least in part, to (continued...)

retardation is a complete defense because it is a mental disease or defect under § 13A-3-1, or whether it believes mental retardation, despite Alabama's express repudiation of the diminished-capacity defense, should, or even can, negate specific intent, as intoxication may in some circumstances. I cannot agree to reverse two capital-murder convictions based on an issue of first impression that is being noticed for the first time by this Court under the plain-error doctrine without first giving the parties the opportunity properly to brief and argue the issue.[18]

For these reasons, I respectfully dissent.

McMILLAN, P.J., concurs.

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assist him in presenting mental retardation as a defense at the guilt phase of the trial, the majority does not hold that the trial court's granting of the State's motion in limine to preclude admission of any evidence of mental retardation at the guilt phase of the trial was error.

[18] I also note that neither of the parties has had an opportunity to address whether Morris made the threshold showing, after his initial evaluation by Dr. Ackerson (which both Morris and the majority concede was a comprehensive evaluation), necessary to require further, independent expert assistance in raising guilt-phase issues relating to insanity, intoxication, and mental retardation.

187

No. 10-808
CAPITAL CASE

Supreme Court, U.S.
FILED
FEB 18 2011
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IN THE
Supreme Court of the United States

ALFONSO MORRIS, *Petitioner,*

v.

STATE OF ALABAMA, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION OF THE STATE OF ALABAMA

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CAPITAL CASE

QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the execution of mentally retarded defendants violates the Eighth Amendment, but left to the States the task of developing the definition of mental retardation and the procedures for determining who is mentally retarded. Under the framework the Alabama Supreme Court established in response, to be found mentally retarded, a capital defendant has the burden of proving three factors: "(1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; *and* (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18)." *Smith v. State*, No. 1060427, ___ So. 2d ___, 2007 WL 1519869, at *8 (Ala. May 25, 2007). Petitioner Alfonso Morris does not challenge that framework generally, but instead raises the following two factbound questions about its application to this particular case by Alabama's intermediate court of appeals:

I. The Alabama Court of Criminal Appeals held that the trial court properly exercised its discretion in finding that Morris failed to prove he was mentally retarded because he did not establish an accurate IQ score below 70. The Court of Criminal Appeals found, among other things, that the evidence supported the trial court's finding that Morris was

"malingering"—*i.e.*, pretending to be less intelligent than he in fact is—when he scored below 70 on certain tests. Did the Court of Criminal Appeals err when it held that the trial court had not abused its discretion on this front?

II. The Court of Criminal Appeals also held that the trial court properly exercised its discretion in weighing the evidence—which included Morris's behavior while incarcerated—and concluded that Morris failed to prove that he suffers from substantial deficits in adaptive behavior. Did the Court of Criminal Appeals err in holding that the trial court had not abused its discretion on this front?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. Proceedings Below 1

1. The Atkins *Hearing* 1

2. The Court of Criminal Appeals' decision 6

REASONS WHY THE PETITION SHOULD BE DENIED 6

I. This Court should deny certiorari on the first question presented concerning whether malingering automatically forecloses a finding of mental retardation. 8

A. There is no split on whether "malingering alone can refute a finding" of mental retardation. 8

1. The Court of Criminal Appeals did not hold that evidence of malingering "necessarily forecloses" a finding that the defendant is retarded 9

2. The Court of Criminal Appeals' decision is consistent with decisions from other jurisdictions. 10

B. Even if this Court were to reverse on the first question presented, it would not change the result. 13

II. This Court should deny certiorari on the second question presented concerning whether evidence of post-incarceration behavior may be considered in assessing a claim of mental retardation. 14

A. There is no split on whether "post-incarceration evidence" can be probative of a defendant's adaptive deficits. 14

B. Even if this Court were to reverse on the second question presented, it would not change the result. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia,
536 U.S. 304 (2002) ..... passim

Byrd v. State,
No. CR-07-0113, ___ So. 3d ___, 2009 WL 1164985 (Ala. Crim. App. May 1, 2009) 7

Chase v. State,
873 So. 2d 1013 (Miss. 2004) 11

Doss v. State,
19 So. 3d 690 (Miss. 2009) 15

Ex parte Van Alstyne,
239 S.W.3d 815 (Tex. Crim. App. 2007) 11

Holladay v. Allen,
555 F.3d 1346 (11th Cir. 2009) 14

Lizcano v. State,
No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010) 15

Smith v. State,
No. 1060427, ___ So. 2d ___, 2007 WL 1519869 (Ala. May 25, 2007) ..... i, 13

Rules

SUP. CT. R. 10 8

Constitutional Provisions

U.S. CONT amend. VIII i

STATEMENT OF THE CASE

A. Proceedings Below

The State indicted Morris on two counts of capital murder. As the Court of Criminal Appeals recounted in detail below, the charges stemmed from effectively uncontroverted allegations that Morris beat an 85-year-old, 92-pound woman to death while burglarizing her home. Pet. App. 2a–8a. Morris was tried for these crimes three times. The first trial resulted in a conviction, a 10-2 jury recommendation for a death sentence, and the trial court's imposition of a death sentence. Pet. App. 166a. But the Alabama Court of Criminal Appeals granted Morris a new trial based the trial court's failure to provide him funds for a mental-health expert in that first trial. Pet. App. 206a. The second trial resulted in a hung jury and therefore a mistrial. Pet. App. 2a. The third trial resulted in another guilty verdict, another jury recommendation by a 10-2 vote for a death sentence, and another court-imposed death sentence. Pet. App. 129a–31a.

The critical facts for present purposes relate to the *Atkins* hearing the trial court conducted before Morris's second trial. During that hearing, the trial court found that Morris was not mentally retarded, and thus was eligible to receive the death sentence under *Atkins*. Pet. App. 13a–24a, 143a–146a.

1. The Atkins *Hearing*

At the *Atkins* hearing, the State introduced numerous witnesses, many of whom Morris either hardly mentions or does not mention at all.

1. Dr. Glen King. First and foremost, Dr. Glen King, a clinical and forensic psychologist, testified that Morris is not mentally retarded. Pet. App. 22a-23a. King concluded that Morris functioned in the high borderline to low average range of intellectual ability with an IQ somewhere in the low 80s. Pet. App. 22a. King testified that Morris had adaptive skills and was able to drive and support himself. Pet. App. 22a. He noted that his opinion was consistent with the opinion of a psychiatrist who examined Morris before his first trial. Pet. App. 22a.

King testified that to the extent others might have concluded that Morris was mentally retarded, the likely explanation was that Morris was "malingering"—or, in other words, was falsely portraying himself as mentally retarded. Pet. App. 20a–21a. Although Morris scored a 41 on an IQ test King had administered, King explained that Morris was "clearly malingering" when he took that test. Pet. App. 20a. King noted that Morris's score was "totally inconsistent" with his general presentation during the interview. Pet. App. 20a. King also noted that people with extreme mental retardation, which Morris clearly does not have, could have answered some of the questions Morris got wrong. Pet. App. 20a. For instance, Morris claimed that a picture of a cat and a ball was in fact a picture of a cat and a child. Pet. App. 20a-22a. On a separate test, Morris obtained a score that is generally received by people who are not functional and cannot even bathe themselves. Pet. App. 21a–22a. In responding to that test, he had claimed that he could not answer a telephone or cut meat. Pet. App. 22a. King had

given Morris a test designed to determine if the person taking the test was intentionally giving wrong answers, and the results confirmed that Morris was malingering. Pet. App. 22a.

2. Wyatt Rhone. Wyatt Rhone, a patient-education coordinator at a medical facility where Morris was evaluated, corroborated King's opinion that Morris is far more intelligent than he had let on. Pet. App. 16a–17a. Rhone met with Morris six times to administer basic assessment tests. Pet. App. 16a. Morris scored a zero on his first test and again scored a zero four to six weeks later. Pet. App. 16a. The flat-zero scores were not credible because Morris was otherwise able to engage in complex thought, such as recalling specific events from television shows. Pet. App. 16a–17a. Even 10 to 11 months later, Morris still scored a zero on that same test and another basic test. Pet. App. 17a. Rhone concluded that Morris was faking, and testified that "[i]f [Morris] was managing to answer all of them wrong, that was an indication of intellectual ability to reason that out." Pet. App. 17a.

3. Vicki Webster. Vicki Webster, a nurse in the jail where Morris had been detained, further confirmed that Morris was capable of significant cognitive functioning. She had met with him at least six times concerning about his medical condition. Pet. App. 17a. During those meetings, he was able to discuss his condition and treatment and was able to take advantage of medical services and fill out paperwork. Pet. App. 17a.

4. Ned Whitehead. Ned Whitehead, a recordkeeper for the jail, also provided evidence that Morris was malingering. Whitehead identified visitors' logs showing that Morris's family had visited him several times in jail. Pet. App. 17a. This evidence refuted Morris's statement, relayed by his own expert, that he had not seen his family and that they did not know where he was located. Pet. App. 17a-18a.

5. Terry Love. Terry Love, an official with the Alabama Probation and Parole Office, provided testimony that bolstered the inference that Morris's test scores had been the product of malingering. Love had interviewed Morris while conducting his pre-sentence investigation in 2003. Pet. App. 18a. Morris had provided Love with information such as his family members' names and the dates they died, his employment history, his involvement in gambling and drug dealing, and the names and birthdays of his children. Pet. App. 18a.

6. Phillip Russell. Phillip Russell, the police officer who interviewed Morris after his arrest, provided more evidence that Morris is far more intelligent than his test scores indicate. During the interview, Morris had tried to conceal his identity by giving Russell his brother's name and date of birth. Pet. App. 18a. Morris had also signed his statement using his brother's name. Pet. App. 18a.

7. Steven Drexler. Finally, Steven Drexler, a handwriting specialist, offered another perspective on Morris's intelligence. Drexler had taken several writing samples from Morris to compare to court documents he had filed. Pet. App. 18a. Morris had altered his handwriting in the samples, and Drexler testified that "it would take a great deal of mental fortitude to be able to maintain that style and not resort back to your normal habits." Pet. App. 18a-19a.

8. Morris's witnesses. Morris presented two witnesses, and neither provided conclusive proof that Morris is in fact mentally retarded. Dr. Allen Shealy testified that he believed Morris to be mildly retarded, but he admitted that he had failed to administer any test designed to assess malingering. Pet. App. 15a. Likewise, Morris's sister simply testified that he had been a slow learner in school. Pet. App. 15a.

After considering all this testimony, the trial court applied the three factors developed by the Alabama Supreme Court for assessing *Atkins* claims and ultimately found that Morris had not established that he is mentally retarded. Pet. App. 23a. First, crediting King's testimony that Morris was malingering, the court found that Morris failed to establish a valid, accurate IQ score below 70 and thus that he could not prove that he had significantly subaverage intellectual functioning. Pet. App. 23a. Second, the trial court found that based on all the evidence, Morris was able to adapt and function. Pet. App. 23a. Third, the trial court found that in light of school records showing that Morris made B's,

C's, and D's and was not in special education classes, Morris had failed to show that retardation had manifested itself before the age of 18. Pet. App. 23a–24a. The trial court therefore rejected Morris's *Atkins* argument and found him eligible for the death penalty. Pet. App. 145a.

2. The Court of Criminal Appeals' decision

After the jury convicted Morris and the trial court imposed a death sentence, Pet. App. 124a–142a, the Alabama Court of Criminal Appeals affirmed the conviction and sentence, Pet. App. 24a–29a. Rejecting Morris's claim that the trial court was required to credit his own expert's testimony alone, the Court of Criminal Appeals explained that "Morris's specific arguments raised on appeal address conflicts in the evidence, which were properly weighed and evaluated by the trial court as the finder of fact." Pet. App. 29a. "Therefore," the Court concluded, "the trial court did not err in determining that Morris is not mentally retarded for purposes of *Atkins*." Pet. App. 29a.

The Alabama Supreme Court then denied Morris's petition for a writ of certiorari. Pet. App. 122a–123a.

REASONS WHY THE PETITION SHOULD BE DENIED

Morris has not raised any certworthy issue. The splits he asserts are illusory, and he is seeking no

more than factbound error correction of the sound decision of an intermediate state appellate court.

This Court has left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences" on mentally retarded defendants. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). In accordance with that directive, the Alabama Supreme Court developed a three-part test for determining whether a defendant is ineligible for the death penalty under *Atkins*, and the Alabama appellate courts have held that the application of that test will generally be "the function of the factfinder ...which [has] the opportunity to personally observe the witnesses and assess their credibility." *Byrd v. State*, No. CR-07-0113, ___ So. 3d ___, 2009 WL 1164985 at *3 (Ala. Crim. App. May 1, 2009). Sifting through that evidence here, the Alabama Court of Criminal Appeals found that "Morris has not proved by a preponderance of the evidence that he is mentally retarded, such that the determination by the trial court, pursuant to the discretion vested in it as fact finder, should be reversed." Pet. App. 24a. In light of testimony from the State's expert that Morris was not mentally retarded—testimony the trial court was entitled to credit, and testimony that Morris hardly mentions in his cert petition—that conclusion was eminently sound.

But in the very least, nothing about that conclusion warrants certiorari. Morris does not challenge the Alabama Supreme Court's three-part test for assessing *Atkins* challenges. He instead challenges an intermediate state appellate court's application of those standards to the specific facts of

this case. He thus seeks no more than the review of asserted "erroneous factual findings," SUP. CT. R. 10, and such review is not the proper domain of this Court. Although Morris has tried to overcome this problem by asserting that the Alabama Court of Criminal Appeals' methodology broke from methodologies used by other courts, he is simply wrong about that. There is no split here, and no other reason why this Court should grant certiorari.

I. This Court should deny certiorari on the first question presented concerning whether malingering automatically forecloses a finding of mental retardation.

There are at least two reasons why this Court should decline to review the first question presented. First, Morris is wrong when he asserts that the Court of Criminal Appeals exacerbated a split on whether evidence of malingering "automatically" compels a finding that the defendant is not retarded. Pet. i. Second, even if this Court were to grant cert on this issue and reverse the Court of Criminal Appeals' decision on the malingering issue, that disposition would not affect the outcome in this case.

A. There is no split on whether "malingering alone can refute a finding" of mental retardation.

Morris misreads both the Court of Criminal Appeals' decision and the jurisprudence of other states when he asserts that the decision below deepened a split on whether "malingering alone can refute a finding" of mental retardation. Pet. 13. As

explained below, the Court of Criminal Appeals did not hold that "malingering alone" precludes any possibility that a defendant is mentally retarded for *Atkins* purposes. *Id.* It instead viewed the evidence of malingering as one of *many* factors justifying the trial court's finding that Morris is not, in fact, mentally retarded. And that conclusion is fully consistent with the way other courts have dealt with this issue when implementing *Atkins*.

1. The Court of Criminal Appeals did not hold that evidence of malingering "necessarily forecloses" a finding that the defendant is retarded.

In asserting that there is a split on the first question presented, Morris has fundamentally misinterpreted the decision of the Court of Criminal Appeals. At no point did that court make a sweeping determination that evidence of a defendant's malingering "[n]ecessarily [f]orecloses" a finding of subaverage intellectual functioning. Pet. 13. Instead, the court reviewed the extensive evidence presented during the *Atkins* hearing and determined that the trial court "did not exceed its discretion" in finding that Morris was not mentally retarded. Pet. App. 24a. To be sure, some of that evidence included testimony that Morris's responses during the assessments must have been the result of malingering. But that evidence also included testimony from witnesses such as Dr. Glen King, who affirmatively concluded that Morris functioned in the high-borderline-to-low-average range of intellectual functioning with an IQ possibly in the low 80s. *See supra* at 2. Because the trial court was

entitled to credit that testimony over the testimony of Morris's expert, it is not accurate to say that the Court of Criminal Appeals held that evidence of malingering, standing alone, "automatically compel[s] the conclusion that the defendant is not mentally retarded." Pet. i. Instead, the Court of Criminal Appeals' decision simply stands for the commonsense proposition that a trial court may consider evidence that the defendant malingered on test responses when determining whether he or she is retarded for *Atkins* purposes.

That conclusion makes eminent sense, and Morris does not appear to challenge its logic here. Intelligent death-row inmates who know about *Atkins* will have every incentive to shoot for low scores on their aptitude tests. When a clearly functioning person who is facing the death penalty manages to score an IQ of 41, there is good reason to think that he is not, in fact, mentally retarded or anywhere close to the line. There is no reason why trial courts cannot consider evidence of malingering, among many other factors, in determining whether a defendant is mentally retarded for *Atkins* purposes. The Court of Criminal Appeals' decision was thus entirely sound.

2. *The Court of Criminal Appeals' decision is consistent with decisions from other jurisdictions.*

Because the Court of Criminal Appeals merely held that the evidence of malingering was relevant, rather than dispositive, Morris has identified no split between that court and other state courts that have touched on this issue. The Court of Criminal

Appeals did not profess to be creating a split or purport to be aware of one, and with good reason. Like the Court of Criminal Appeals, courts in other states have analyzed evidence of malingering as one of many factors in determining, under the standards those states have established to implement *Atkins*, whether a defendant is mentally retarded and thus ineligible for the death penalty.

For example, Mississippi—the sole state Morris says is on the same side of this illusory "split" as the Court of Criminal Appeals—has never said that malingering automatically forecloses an inference of mental retardation. In the decision Morris cites, *Chase v. State*, 873 So. 2d 1013 (Miss. 2004), the Mississippi Supreme Court simply established procedural requirements to guide Mississippi courts in "reaching a determination of mental retardation." *Id.* at 1029. The court there said that the relevant considerations include whether the defendant had taken certain tests and whether the defendant was malingering. *Id.* The Mississippi Supreme Court never held as a matter of law that evidence of malingering "automatically forecloses" a finding of subaverage intellectual functioning.

Likewise, Texas—the sole state Morris says is on the other side of this supposed "split"—has not said anything meaningfully different from what the Court of Criminal Appeals said below. The only decision Morris cites from Texas—the Texas Court of Criminal Appeals' opinion in *Ex parte Van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007)—did not address any argument that malingering can *automatically* foreclose a finding of subaverage intellectual functioning. All the Texas court did was

assess whether, in the circumstances of that particular case, there was reason to believe that the defendant had faked a result on his IQ test. The Texas Court of Criminal Appeals, acting as factfinder, found that he had not. In the footnote Morris cites, the court found that, although the state's expert had testified that he was concerned about whether the defendant was malingering, the defense expert had in fact tested for malingering and found that the defendant was being straightforward. *See Van Alstyne*, 239 S.W.3d at 818 n.8. It was on that basis that the Court of Criminal Appeals noted that "regardless of whether the applicant may have been malingering in an attempt to obtain a lower score *ten days later with [the State's expert],* the test results obtained by [the defendant's expert], placing the [defendant] within the range of the mildly mentally retarded, remain valid." *Van Alstyne*, 239 S.W.3d at 818 n.8 (emphasis added). This contextual weighing of the evidence—and, particularly, this placement of considerable weight on the results of a test given to determine whether the defendant was malingering—is fully consistent with the Alabama Court of Criminal Appeals' fact-driven analysis here.

Even if the state courts' approaches had diverged along these lines, a 2-1 split involving one decision by an intermediate state court of appeals would hardly call for this Court's immediate intervention. But there is no split here. For that reason alone, this Court should deny cert on the first question.

B. Even if this Court were to reverse on the first question presented, it would not change the result.

Even if there were a split here, this case would provide a poor vehicle to resolve it. For even if this Court were to reverse the Court of Criminal Appeals' decision on this issue, the result for Morris would remain the same. Under the Alabama Supreme Court's three-part test for determining whether a defendant is mentally retarded for *Atkins* purposes, the defendant must show: "(1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; *and* (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18)." *Smith v. State*, No. 1060427, ___ So. 2d ___, 2007 WL 1519869 at *8 (Ala. May 25, 2007). Critically for present purposes, "*[a]ll three* factors must be met in order for a person to be classified as mentally retarded." *Id.* (emphasis added). Yet, the first question presented here relates solely to the lower court's holding on the first factor. While Morris's second question presented addresses the second of these factors, Morris makes no attempt to challenge the Court of Criminal Appeals' separate ruling that he also failed to establish the third factor. *See* Pet. App. 27a. A ruling for Morris on the first question would thus not affect the ultimate outcome in this case. So even if there were a split on this question and reason to believe that the lower court were wrong on this issue, this case would not be the right vehicle to address it.

II. This Court should deny certiorari on the second question presented concerning whether evidence of post-incarceration behavior may be considered in assessing a claim of mental retardation.

This Court should deny cert on the second question presented for the same reasons. Morris has pointed to no split on whether courts may, for *Atkins* purposes, rely on "post-incarceration evidence" about a defendant's "adaptive deficits." Pet. 19. And even if this Court were to grant cert on this question and reverse, that disposition would not affect the ultimate outcome in this case.

A. There is no split on whether "post-incarceration evidence" can be probative of a defendant's adaptive deficits.

Morris is once again wrong when he asserts that the courts are split on whether they may consider evidence of defendants' post-incarceration behavior when determining whether they suffer from adaptive deficits for *Atkins* purposes. All lower courts have indicated that the factfinder may consider evidence of this sort. Any other rule would preclude the factfinder from considering the most readily available evidence about the defendant and his mental state. The lower courts have uniformly, and wisely, resisted that absurd result.

Morris is simply mistaken when he asserts that three jurisdictions—the Eleventh Circuit, Mississippi, and Texas—have found to the contrary. *See* Pet. 21–22 (citing *Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009); *Doss v. State*, 19 So. 3d 690

(Miss. 2009); *Lizcano v. State*. No. AP-75879, 2010 WL 1817772 (Tex. Crim. App. May 5, 2010)). The Eleventh Circuit in *Holladay* did not categorically preclude trial courts from considering post-incarceration evidence. It instead simply noted in the recitation of facts, and then again in a footnote, that certain experts in that case had primarily considered evidence from the defendant's youth in making their assessments because they considered that evidence more reliable than evidence of the defendant's behavior later in his life. *See Holladay*, 555 F.3d at 1351, 1358 n.16. The Mississippi and Texas decisions are even farther off-point. The Mississippi Supreme Court in *Doss* simply rejected an expert's opinion on the defendant's adaptive functioning because it was not normed for subjects in prison and because the expert had not spoken to any witnesses except the defendant. *See Doss*, 19 So. 3d at 711, 714. And the portion of the Texas Court of Criminal Appeals' (unpublished) decision that Morris cites as establishing a "split" is, in fact, a dissenting opinion. *See Lizcano*, 2010 WL 1817772, at *38 (Price, J., concurring and dissenting).

There is thus no split here. All the (majority) decisions that have touched on this issue have indicated that courts may consider post-incarceration evidence in assessing whether a defendant suffers from deficits in his adaptive behavior for *Atkins* purposes. How a court will weigh that evidence, in the light of other, possibly conflicting evidence, will be precisely the sort of contextualized, factbound inquiry that this Court envisioned when it left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences" on mentally retarded

defendants. *Atkins*, 536 U.S at 317. Any categorical rule precluding resort to this evidence would unduly restrict state courts' ability to fashion workable procedures for implementing *Atkins*.

B. Even if this Court were to reverse on the second question presented, it would not change the result.

Likewise, as was the case with the first question presented, this case would be a poor vehicle for resolving the second question because a ruling in Morris's favor would not affect the outcome in his case. Because Morris has not challenged the Court of Criminal Appeals' ruling that he did not establish the third factor of the Alabama Supreme Court's three-part test implementing *Atkins*, his sentence would still be due to be affirmed even if he prevailed on this question. *See supra* at 14-15. There is thus no reason to grant cert on either question presented.

CONCLUSION

The Court should deny Morris's cert petition.

Respectfully submitted,

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183

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CAPITAL CASE

IN THE

Supreme Court of the United States

ALFONSO MORRIS,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

REPLY BRIEF OF PETITIONER

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Table of Contents

Table Of Authorities ii

Reply Brief of Petitioner 1

I. The Lower Courts Are Divided As To Whether Evidence of Malingering and Post-Incarceration Adaptive Behavior Can Trump All Other Contradictory Evidence. 1

II. The Court's Reversal On the Questions Presented Would Affect the Result in This Case Because of the Overlap of Evidence Presented for All Three Parts of Alabama's Test. 6

Conclusion 9

Table Of Authorities

Cases

Atkins v. *Virginia*,
536 U.S. 304 (2002) ..... passim

Chase v. *State*,
873 So. 2d 1013 (Miss. 2004) (en banc) 3

Doss v. *State*,
19 So. 3d 690 (Miss. 2009) 5

Ex parte van Alstyne,
239 S.W.3d 815 (Tex. Crim. App. 2007) 3, 4

Holladay v. *Allen*,
555 F.3d 1346 (11th Cir. 2009) 5

Jones v. *State*,
966 So. 2d 319 (Fla. 2007) 5

King v. *State*,
23 So. 3d 1067 (Miss. 2009) 3

Maldonado v. *Thaler*,
625 F.3d 229 (5th Cir. 2010) 5

Spicer v. *State*,
973 So. 2d 184 (Miss. 2007) 3

Thomas v. *Quarterman*,
335 Fed. Appx. 386 (5th Cir. 2009) 5

Walker v. *Kelly*,
593 F.3d 319 (4th Cir. 2010) 5

Rules

SUP. CT. R. 10 1

Other Authorities

Death Penalty Information Center, Number of Executions by State and Region Since 1976, *available at* http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 1–2

Reply Brief of Petitioner

The State's opposition sidesteps the two questions in Mr. Morris's petition by incorrectly characterizing them both as "factbound," *see* Opp. 7, and therefore outside the purview of the Court as "erroneous factual findings." *See* Opp. 8, citing SUP. CT. R. 10. Contrary to the State's position, the questions presented address a division among the lower courts regarding the legal standards governing the use of (1) evidence of malingering, or even the suggestion of malingering, and (2) evidence of post-incarceration adaptive behavior to defeat otherwise substantiated evidence of mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court left it to the states to determine how mental retardation should be defined, but the Court emphasized that states cannot adopt definitions of mental retardation that cover a smaller group than those considered mentally retarded under the national consensus approach. *See id.* at 317. This case provides an opportunity for the Court to address these divisions and to provide clarity as to how mental retardation determinations are to be made.

I. The Lower Courts Are Divided As To Whether Evidence of Malingering and Post-Incarceration Adaptive Behavior Can Trump All Other Contradictory Evidence.

A. The State claims that a split of the courts on the first question presented in Mr. Morris's petition — specifically, Alabama and Mississippi on one side and Texas on the other — "hardly call[s] for this Court's immediate intervention." *See* Opp. 12. A split

among these particular states is of heightened concern, however, because these three states accounted for the majority of American executions in 2010. *See* The Death Penalty Information Center, Number of Executions by State and Region Since 1976, *available at* http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last updated February 23, 2011). Indeed, as of the filing of this reply, Texas and Alabama have executed three of the eight individuals put to death so far in 2011. *Id.*

Contrary to the State's characterization of the first question presented, the trial court in this case did not weigh evidence of malingering. It instead confirmed the conclusion of the State's expert, Dr. King, that Mr. Morris's "malingering indicated that he was not mentally retarded." *See* Pet. App. 24a. In affirming that conclusion, the Alabama Court of Criminal Appeals also did not weigh this conclusion against the contradictory evidence that Mr. Morris's expert Dr. Allen Shealy presented, even though this contradictory evidence demonstrated that Mr. Morris is mentally retarded.

Moreover, Dr. Shealy's conclusion that Mr. Morris is mentally retarded accounted for any possible malingering. *Id.* at 154a. The State expert's statement that Mr. Morris had a higher IQ than tested ("*possibly* in the low 80s") because of malingering was only speculation. *See id.* at 22a (emphasis added). In fact, the decision of the Court of Criminal Appeals overlooked the findings of Dr. Shealy that someone could malinger on a test and yet still be mentally retarded. *See id.* at 154a. Therefore, the de-

cision of the Court of Criminal Appeals allowed one expert's claim of malingering to trump all other evidence to the contrary.

The Alabama Court of Criminal Appeals in this case and the Mississippi courts in *Chase v. State*, 873 So. 2d 1013 (Miss. 2004), *King v. State*, 23 So. 3d 1067 (Miss. 2009), and *Spicer v. State*, 973 So. 2d 184 (Miss. 2007), did not specifically state in their decisions that evidence of malingering "necessarily foreclosed" a finding of mental retardation. Those courts, however, applied exactly that line of reasoning. For example, the *Chase* court held that any expert testifying as to the mental retardation of a defendant must perform a malingering test and establish, with a reasonable degree of certainty, that "the defendant is not malingering." *Id.* at 1029; *see also King*, 20 So. 2d at 1075 (same); *Spicer*, 973 So. 2d at 209 (same). Similarly, the Court of Criminal Appeals confirmed a finding that Mr. Morris was not mentally retarded merely because there was an indication that he was malingering.

Conversely, the court in *Ex parte van Alstyne*, 239 S.W.3d 815 (Tex. Crim. App. 2007), confirmed a finding of mental retardation, even though there were indications that the defendant may have been malingering. The *van Alstyne* court emphasized the "important role of experts in screening defendants for mental health issues, including mental retardation" and credited the test results obtained by the defendant's expert. *Id.* at 818.

The State's formulation of this first part of Alabama's three-part test would permit courts to credit

evidence of malingering over any other contradictory or competing evidence — which is exactly what the Texas court in *van Alstyne* cautioned against doing. It also would fail to account for the possibility that an individual could malinger on an intelligence test and nevertheless be mentally retarded.

Moreover, the State's reliance on malingering tests ignores scientific findings that such tests are flawed and often result in false positives. Dr. Shealy testified at Mr. Morris's *Atkins* hearing in 2007 that the malingering test used to evaluate Mr. Morris — the same one that the Criminal Court of Appeals confirmed in its decision — was considered to be "not appropriate to be administered to people who are mentally retarded." Pet. App. 151a. He explained that studies had discovered that the test "found a significant number of false positives in people who were mentally retarded who weren't facing any court charges." *Id.* Such flaws in the way that malingering is tested further highlight why an indication of malingering should not be automatically presumed to trump other substantiated evidence of mental retardation.

B. The lower courts also are split regarding the use of post-incarceration evidence to assess a person's adaptive functioning, the second part of Alabama's three-part test. On one side of the split, the Court of Criminal Appeals in this case allowed post-incarceration evidence of adaptive behavior to trump all other contradictory evidence of prior deficits. In particular, the court ignored evidence regarding Mr. Morris's childhood, including his school records —

which demonstrated serious and sustained deficiencies, Clerk's Record (Second Supp. Record) at 382–86 — as well as testimony from Mr. Morris's family regarding his limitations, Nov. 26, 2007 Hearing Tr. (Supp. Record Vol. 2) at 39, 71–75, 79. Courts in the Fourth and Fifth Circuits and the Florida Supreme Court have adopted reasoning similar to that of Alabama. *See* Pet. 20–21, citing *Walker* v. *Kelly*, 593 F.3d 319, 328 (4th Cir. 2010); *Maldonado* v. *Thaler*, 625 F.3d 229, 243 (5th Cir. 2010); *Thomas* v. *Quarterman*, 335 Fed. Appx. 386, 389 (5th Cir. 2009); and *Jones* v. *State*, 966 So. 2d 319, 328 (Fla. 2007).

On the other hand, courts in the Eleventh Circuit and in Mississippi have applied a standard that places the principal focus on *pre*-incarceration deficits when determining a defendant's adaptive functioning. *See Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009); *Doss v. State*, 19 So. 3d 690 (Miss. 2009). Both courts in *Holladay* and *Doss* refused to credit evidence of *post*-incarceration adaptive behavior over evidence of deficiencies prior to incarceration. In fact, the court in *Doss* criticized and ultimately rejected use of certain post-incarceration evidence because of its fundamental unreliability. *Id.* at 714 (rejecting evidence from adaptive-functioning tests that "were not normed for a prison population"). As with evidence of malingering, evidence of post-incarceration adaptive functioning may be significantly flawed due to the "highly restricted and restrictive environment" of prison. *See Holladay*, 555 F.3d at 1358 n. 16. For this reason, it is critical that courts not allow evidence of post-incarceration adaptive behavior to

trump all other credible evidence of adaptive deficits from before an individual's time in prison.

II. The Court's Reversal On the Questions Presented Would Affect the Result in This Case Because of the Overlap of Evidence Presented for All Three Parts of Alabama's Test.

As an initial matter, the State's opposition splits up both questions presented in an apparent attempt to suggest that a reversal on each individual question would have no effect on Mr. Morris's situation. Naturally, a reversal on both questions would address just two of the three requirements of Alabama's three-part test. In this case, however, the decision of the Court of Criminal Appeals on the third and last part of the test — manifestation of mental retardation and significant deficits in adaptive behavior before age 18 — relied on evidence presented for the other two parts, and therefore a different outcome on the first two requirements would affect the outcome on the third requirement as well.

In particular, the Court of Criminal Appeals considered evidence of Mr. Morris's behavior in prison to overcome contradictory evidence establishing mental retardation before age 18. Such evidence of childhood mental retardation included that Mr. Morris had an IQ score of 73 at age six — an IQ score that *Atkins* considered as mentally retarded — and that he suffered from a sustained poor school performance. Nevertheless, the decision of the Court of Criminal Appeals overlooked this evidence of childhood mental

retardation and significant deficits and instead credited evidence of Mr. Morris's prison-behavior, as well as the above-described malingering tests, *supra* at 2, to establish that his mental retardation did not begin before age 18. *See* Pet. App. 28a (crediting evidence of Mr. Morris's attempts to seek medical care in prison to trump testimony from his sister that he was "incapable of taking his temperature or taking medicine"). Without this evidence of malingering and post-incarceration behavior, the Court of Criminal Appeals would have had no choice but to confirm the evidence of Mr. Morris's mental retardation and severe behavioral limitations from childhood.

* * *

This case is a good vehicle for the Court to address the growing divisions among the lower courts as to the legal standards that should be applied for implementation of *Atkins*. Specifically, this case provides an opportunity for the Court to confront the troubling trend of courts allowing evidence of malingering and post-incarceration adaptive functioning to trump all other contradictory evidence demonstrating a defendant's mental retardation. This trend is particularly worrisome because experts in the field have highly criticized the tests used for determining malingering and the methods by which post-incarceration adaptive behaviors are evaluated.

Furthermore, crediting evidence of malingering and post-incarceration behavior necessarily favors the state, rather than the individual. Allowing evidence of malingering to foreclose a finding of mental retardation would mean that a defendant could

never rebut such evidence. Similarly, the state would always benefit from relying on post-incarceration behavior because the highly restrictive nature of prison would necessarily provide evidence of adaptive functioning, even though such evidence may not be indicative of an individual's actual limitations. The two issues presented provide an opportunity for the Court to inject clarity into these analyses and ensure that *Atkins* is properly implemented by the lower courts.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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